United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1072

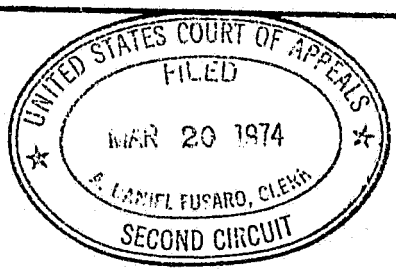
To be argued by
Henry Mark Holzer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JASPER ROBERSON	:	
	:	
Relator - Appellant,	:	
	:	Docket No. 74-1072
- against -	:	
STATE OF CONNECTICUT	:	
	:	
Respondent - Appellee.	:	

On Appeal From The Denial of a Petition For a Writ of Habeas Corpus (By Clarie, United States District Judge, In The United States District Court For The District of Connecticut)

BRIEF AND APPENDIX FOR RELATOR-APPELLANT JASPER ROBERSON



HENRY MARK HOLZER
Assigned Counsel for Relator-Appellant

Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
(212) MA 5-2200

TABLE OF CONTENTS OF BRIEF

TABLE OF CONTENTS OF APPENDIX

TABLE OF CITATIONS

Cases

Constitution

Statutues

Miscellaneous

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jasper Roberson,

Relator - Appellant,

- against -

State of Connecticut,

Respondent - Appellee.

On Appeal From The Denial of a Petition For A Writ of Habeas Corpus (By Clarie, United States District Judge, In The United States District Court For The District of Connecticut)

BRIEF FOR RELATOR-APPELLANT JASPER ROBERSON

STATEMENT OF THE CASE

This is an appeal by a Connecticut prisoner from the November 9, 1973 denial of a petition for a writ of habeas corpus by the United States District Court for the District of Connecticut (Clarie, District Judge). The court's ruling/order, which is not reported, was made and filed on November 9, 1973 (A.1-10). Judgment entered thereon, dated November 20, 1973, was filed on November 26, 1973 (A.11). Notice of appeal dated November 26, 1973, was filed on November 28, 1973 (A.12), and by order of Circuit Judge Feinberg dated

February 20, 1974, Henry Mark Holzer, Esq., was assigned pursuant to the Criminal Justice Act as counsel for this appeal. (The Docket entries below, required by Judge Feinberg's order to be set forth in the appendix, are found at A.13-14).

Appellant, now incarcerated in a Connecticut prison, contends that his federal constitutional rights have been violated in three ways: (1) by the State revoking his probation on an earlier narcotics conviction, solely because of subsequent, but non-final, robbery convictions; (2) because of the inordinate delays between arrest and filing of the Information, and then the delays until the trials; and (3) because the State's archaic appellate procedures have prevented him from having his appeals from two robbery convictions reviewed administratively or heard judicially for $2\frac{1}{2}$ years in one case and 2 years in the other; indeed neither robbery conviction has yet been appealed even though Appellant has already served his time and been paroled on both.

STATEMENT OF QUESTIONS PRESENTED

I. Were Appellant's federal constitutional rights violated when his probation was revoked and he was incarcerated solely because of new, unrelated convictions which, at the time of revocation, had not yet been appealed?

II. Were Appellant's federal constitutional rights violated when 6 months elapsed between his arrest on robbery

charges and the filing of an Information, when 1 year elapsed between the filing of the Information and his trial on one robbery charge, and when nearly 1½ years elapsed between the filing of the Information and his trial on the other robbery charge?

III. Were Appellant's federal constitutional rights violated when, solely because of Connecticut's inaction and its archaic appellate procedures, his appeals as of right have still not been heard from robbery convictions rendered on July 9, 1971 and October 8, 1971, the sentences for which Appellant has already served?

STATEMENT OF FACTS

The facts of this case (which on the surface may appear somewhat confusing) can best be understood if they are reviewed chronologically, since they include what occurred in various state administrative and judicial proceedings and in two applications for federal habeas corpus.

December 10, 1969: Appellant is found guilty on a state narcotics offense. (Record on Appellant's appeal from the Superior Court for New Haven County to the Supreme Court of Connecticut (hereafter referred to as "Record"), A.15-25, at A.21).

January 9, 1970: Appellant is sentenced to 2-5 years, suspended, and placed on probation for 3 years. (Presumably, without more, the probation would have ended on January 9, 1973, over a year ago). (Record, A.21).

January 18, 1970: Appellant is arrested on 2 charges of robbery, allegedly committed after his probation sentence on the narcotic charge, on January 9, 1970. (The record is unclear as to whether the robberies were related, although they were charged in 2 counts of one Information). (Record, A.21).

January 18, 1970: Appellant is incarcerated on the robbery charges, being unable to post bail. (Motion to set aside judgments on robbery convictions, A.26-27, at A.26). (He remains in jail, for successively different reasons, from January 18, 1970 to the date this brief is filed, and probably will still be in jail when this case is argued during the week of May 6, 1974).

June 16, 1970: Appellant is charged in an Information (2 counts) with the two robberies. (Record, A.22).

June 30, 1971: A year and a half after being arrested on the robbery charges, Appellant is found guilty, after trial, on robbery count 1. (Record, A.21,22).

July 9, 1971: Appellant is sentenced on robbery count 1 to 2-4 years. (Record, A.21,22).

July 9, 1971: Appellant files notice of right to appeal and request for sentence review in regard to his conviction on robbery count 1. (See second paragraph of Appellant's memorandum in support of his second habeas corpus petition (H-180), which is in the Court's file herein).

October 1, 1971: Nearly 2 years after first being arrested on the robbery charges, Appellant is found guilty, after trial, on robbery count 2. (Record, A.22).

October 8, 1971: Appellant is sentenced on Robbery count 2 to 4-8 years, to run concurrently with the 2-4 year sentence on Robbery count 1 which had been imposed on July 9, 1971. (Record, A.22). He will become eligible for parole from this sentence on July 29, 1973.

October 8, 1971: Appellant receives a hearing on his alleged probation violation, at which he is represented by counsel. Apparently because the judge believes that "the violation of probation is the conviction of any crime" (Minutes, A.31, emphasis added), he revokes Appellant's probation despite the contention of Appellant's counsel "that probation cannot be violated as long as the /Robbery/ matter is still on appeal, on direct appeal." (Minutes, A.34).

October 8, 1971: The court orders: (1) that the January 9, 1970, suspended sentence on the narcotics conviction and the probation thereon are revoked, and the sentence of 2-5 years is to be executed, (2) but not until after the 4-8 year sentence imposed on Robbery count 2 (which was concurrent to a 2-4 year sentence on Robbery count 1). (Minutes, A.33; Record, A.22).

November 15, 1971: Appellant files in New Haven Superior Court an Application For Review Of Sentence, dated November 10, 1971, in Connection with "Docket No. 16787," the Robbery convictions. (A.35).

November 18, 1971: Appellant files notice of appeal to the Supreme Court of Connecticut from the order of October 8, 1971

revoking his probation. (Record, A.21).

November 18, 1971: Appellant files notice of appeal to same Court from his conviction on Robbery count 2. (See page 2 of State's return to habeas corpus petition; but cf. page 1 of Appellant's memorandum in support of the petition, which sets the date as October 8, 1971; both documents are in court's file herein).

November 19, 1971: Appellant is informed by the Sentence Review Division Of the Superior Court that since the Docket No. 16787 (Robbery) convictions are on appeal, "no further action will be taken on this case pending disposition of the appeal." (A.36).

January 19, 1972: Appellant requests Finding for an appeal to the Supreme Court of the State of Connecticut in probation revocation case. (Record, A.20).

March 9, 1972: Superior Court's Finding is filed in probation revocation appeal. (Record, A.24).

June 5, 1972: Superior Court's assignment of errors is filed in probation revocation appeal. (Record, A.25).

July 31, 1972: date of record in probation revocation appeal. (Record, A.25).

August 2, 1972: apparent date record filed in probation revocation appeal. (Record, A.15).

September 25, 1972: Appellant's brief is filed on or about this day, in Connecticut Supreme Court, in the appeal from the revocation of his probation. (See Appellant's memorandum in support of his second petition for habeas corpus). Although more than a year has elapsed since the Robbery count 1 conviction, and nearly a year since the Robbery count 2 conviction, neither Robbery count is yet ready for appeal. Apparently, the State has not provided Appellant with a transcript, or taken any other steps to move the Robbery appeals. Appellant has 10 more months to serve before being eligible for parole from the robbery convictions, but still faces the original 2-5 years of the revoked probation on the narcotics conviction.

February 28, 1973: The State's brief is filed on or about this day in the appeal from the revocation of probation, 5 months after Appellant's brief was filed. There is still no movement on the robbery appeals, although now Appellant is within 5 months of being eligible for parole on the robbery convictions. (See Appellant's memorandum in support of his second petition for habeas corpus). Apparently, the State still has done nothing.

April 3, 1973: The Appeal is argued in the probation revocation case. (See Appellant's memorandum in support of his second petition for habeas corpus).

June 19, 1973: The Supreme Court of the State of Connecticut affirms the probation revocation. (Connecticut opinion, A.37-40); this opinion is also a reference source for many of the facts set forth herein).

July 29, 1973: After having served the necessary time, Appellant is paroled on the robbery convictions, but remains in jail, now to serve the original (revoked) 2-5 year sentence on the earlier narcotics conviction.' The robbery appeals have still not been heard, 2 years and 1½ years after the robbery convictions, although Appellant has now been paroled on them. (See the State's return to habeas corpus petition; but cf. Appellant's memorandum in support of the petition.)

August 14, 1973: Two years and one month after the Robbery count 1 conviction, and 1 year and 10 months after the Robbery count 2 conviction, the draft finding is filed in connection with Appellant's appeal from the Robbery count 2 conviction. (Motion, supra, A.27; but cf. the State's return on Appellant's second petition for habeas corpus, setting the date as August 10, 1973).

September 13, 1973: On this date, as the result of Appellant's first federal habeas corpus petition (H-165) (filed on a date not disclosed by the file in the instant case) Judge Newman, in a memorandum of decision, holds that Appellant had no federal right to be at liberty pending the robbery appeals, which had still not been heard. (Apparently, no appeal was taken, although the record does not indicate if Appellant was ever served with the judgment). (2d habeas opinion (Clarie, J.), A.3-4); this opinion is also a reference source for many of the facts set forth herein).

September 24, 1973: Appellant brings federal habeas corpus No. 2 (H-180), alleging a federal constitutional right not to

have had his probation revoked on the basis of non-final state convictions, and also that Connecticut's archaic appeal procedures violated additional constitutional rights. (Petition, A.41-42; Docket, A.14).

September 29, 1973: State granted extension to March 15, 1974, to file its counter-findings on Appellant's appeal of the robbery count 2 conviction. (Motion, supra, A.27).

October 2, 1973: State granted extension to November 15, 1973 to file its counter-findings on Appellant's appeal of the robbery count 1 conviction. (Motion, supra, A.27).

November 9, 1973: Judge Clarie dismisses Appellant's petition No. 2, in a ruling/order which holds: (1) that he possesses no federal right to be at liberty pending the robbery appeals, and (2) that as to the alleged constitutional violation arising out of Connecticut's archaic appellate practices, Appellant had failed to exhaust his state remedies, to wit, Section 696 of the Connecticut Practice Book. (A.1-10; Docket, A.14).

November 15, 1973: State's extended time in which to file counter-findings in Appellant's appeal from the robbery count 1 conviction expires, with the counter-finding not having been filed.

November 27, 1973: On or about this date Appellant moves in the Connecticut Supreme Court, per Connecticut Practice Book §696, to set aside the robbery count 1 and count 2 convictions

on the ground, in effect, that he has been denied the right of speedy appeals from said convictions. (Motion, supra, A.26-27).

November 28, 1973: Appellant files a notice of appeal from the judgment (A.11) entered on Judge Clarie's ruling/order (A.1-10) denying Appellant's second application for federal habeas corpus (A.41-42). (Docket, A.14).

January 2, 1974: The Connecticut Supreme Court, in effect, denies the motion made by Appellant (after Judge Clarie's decision) pursuant to Connecticut Practice Book §696, to set aside both robbery convictions because of the State's failure to proceed with the robbery appeals. (Motion decision, A.43). Appellant, who has been in jail since January 18, 1970, is still there, having served his time and been paroled on the robbery convictions which have not yet been appealed -- now he is serving his sentence for the narcotics conviction probation revocation which, of course, occurred because of the as yet non-final robbery convictions. In short, nearly 4 years after being arrested on robbery charges which are not yet final, and on which he received a 4-8 year sentence, Appellant has served all of his time but is still in jail because of a probation violation predicated on the same not yet final robbery charges.

March 5, 1974: According to John R. Williams, Esq., Appellant's assigned counsel in Connecticut, the appeals from the robbery convictions have still not been heard, and probably will not be "before late 1974 or early 1975." (See A.44-48 (especially A.48), a February 26 and a March 5, 1974 letter from Mr. Williams to Professor Holzer).

May 6, 1974: Pursuant to Judge Feinberg's order, this appeal is to be argued the week of May 6, 1974, at which time Appellant will doubtless still be in a Connecticut prison because of robbery convictions originating on January 18, 1970 -- convictions which are not yet final (in a State, no less, with no intermediate appellate court), and from which Appellant (presumably) has an absolute right to appeal.

POINT I

APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS PROBATION WAS REVOKED AND HE WAS INCARCERATED SOLELY BECAUSE OF NEW, UNRELATED CONVICTIONS WHICH, AT THE TIME OF REVOCATION, HAD NOT YET BEEN APPEALED.

Only a few years ago, in another Connecticut State Board of Parole case, Judge Kaufman had occasion to observe that:

> Unlike most other Circuits, this court until recently has had little occasion to consider constraints that Fourteenth Amendment guarantees may place on the operation of state parole systems. (United States ex rel. Bey v. Connecticut State Board of Parole, 443 F.2d 1079 (2 Cir. 1971)).

It is respectfully suggested that if the Constitution requires "that parolees be afforded legal assistance at a proceeding to determine whether parole status should be revoked,"

as Bey held (443 F.2d at 1080), then the Constitution also requires that probation not be revoked on the basis of a non-final conviction which has not yet been appealed as of right.

There is no doubt that Appellant's probation was revoked solely because of his robbery convictions. At the revocation hearing Judge Levine stated, albeit in the form of a question, that "the violation of probation is the conviction of any crime..." (A.31, emphasis added). If there was any lingering question after the hearing as to why Judge Levine had revoked Appellant's probation, the Judge's Findings provide a clear answer:

> The following conclusions have been reached:
>
> 19. The /Appellant/ has violated the terms of his probation included in the sentence imposed on January 9, 1970, upon being convicted of a crime. (A.23, emphasis added).

There is also no doubt that Appellant promptly noticed appeals from the robbery convictions. (A.21, 31, 32, 34).

In dealing with Appellant's contention that he possessed a federal constitutional right to remain at liberty until an appeal determined whether his robbery convictions would become final, the District Judge relied exclusively on what he considered to be the "numerous authority" (A.3) to be found in

the Connecticut Supreme Court's opinion (A. 37-40) on Appellant's appeal there from the probation revocation, and on one case cited there from this Circuit, United States v. Markovich, 348 F.2d 238 (2 Cir. 1965).

The fact is, however, that neither the Supreme Court of the United States nor this Circuit has ever ruled on the precise point presented here.(1)

Indeed, only one Circuit seems to have done so, the Ninth, in United States v. Carrion, 457 F.2d 808 (9 Cir. 1972), cited by the Connecticut Supreme Court. Although Carrion is contra to Appellant's contention here, the per curiam opinion is rooted neither in case authority nor in reasoning. In one short paragraph the court implies that despite the pending appeal, the conviction was somehow "final;" but, the court goes on, even if the conviction was not final, since probation can be revoked even without a conviction it surely can be revoked once there is a conviction, even though that conviction is not final.(2) In other words, the Carrion court seems to rely an a fortiori approach: if probation can be revoked without a conviction (as indeed it can), it can be revoked once there is a conviction. Unfortunately, there is no discussion of the effect, if any, of the pendency of an appeal from that conviction -- and that is the nub of Appellant's contention here:

(1) In Markovich the crime for which probation was revoked had not even come to trial, let alone was a conviction on appeal.
(2) Markovich is cited as authority.

that neither on a fortiori reasoning, nor on any other basis, can it be said that for probation revocation purposes the pendency of an appeal is of no constitutional importance; that although probation can be revoked without a conviction, or on a conviction alone, once an appeal is taken the equation is drastically changed, and the Constitution then prohibits revocation before the probationer's direct appellate rights are exhausted.

Although it is true that the Constitution may not require any state or the federal government to grant the right of appeal (McKane v. Durston, 153 U.S. 684; and see Griffin and Douglas, infra), it is equally true that once granted (as universally it has been) the right of appeal and the incidents thereto become of tremendous importance, and many aspects thereof have been held to be entitled to constitutional protection:

• Failure to provide a convicted indigent defendant with a transcript (or its equivalent) needed for the prosecution of an appeal violates due process and equal protection. (Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956)).

• A convicted indigent defendant must be afforded counsel when, on appeal, he challenges a lower court's certification that his appeal is not taken in good faith. (Johnson v. United States, 352 U.S. 565, 77 S. Ct. 550 (1957)).

• Where an issue on appeal is not necessarily frivolous, application by a convicted indigent defendant for leave to proceed in forma pauperis should be granted. (Ellis v. United States, 356 U.S. 674, 78 S. Ct. 974 (1958)).

• Where a convicted indigent defendant can not pay the docket and filing fees necessary to invoke the discretion of an appellate court, due process and equal protection are violated by a state's refusal to permit him to file a motion for leave to appeal. (Burns v. Ohio, 360 U.S. 252, 79 S. Ct. 1164 (1959)).

• When a state makes available the writ of habeas corpus (or state post conviction proceedings) only to prisoners able to pay the necessary filing fees, it denies indigent prisoners equal protection. (Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895 (1961)).

• When the merits of a convicted indigent defendant's appeal, as of right, are decided without the benefit of counsel (if the defendant wants counsel), he is denied equal protection of the law; appellate counsel must be appointed. (Douglas v. California, 372 U.S. 253, 83 S. Ct. 814 (1963)).

• Any procedure is unconstitutional whereby a Public Defender can cut off an appeal by a convicted indigent defendant. (Lane v. Brown, 372 U.S. 477, 83 S. Ct. 768 (1963)).

• The conclusion of a trial judge that the appeal of a convicted indigent defendant is frivolous, is an inadequate substitute for full appellate review. (Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774 (1963)).

• Because of the importance of appeals in criminal cases, equal protection is violated by a state (New Jersey) statute which imposed on only those indigents who were imprisoned the duty to reimburse the county for the cost of a transcript if the appeal was unsuccessful -- where the same financial burden was not imposed on persons who received a suspended sentence, were placed on probation, or were sentenced only to pay a fine. (Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497 (1966)).

• A state defendant was denied due process and equal protection where: (1) appointed appellate counsel prepared no brief, but instead advised the court by letter that he found the appeal to be without merit, (2) defendant's request for new counsel was denied, and (3) the state courts, without expressly determining that the appeal (on which defendant's pro se brief failed to raise a constitutional question) was frivolous, then determined that the appeal (and a subsequent habeas corpus petition) had no merit. (Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967)).

• The constitutional requirements of due process and equal protection can only be attained where appellate counsel, assigned or otherwise, acts as an active advocate on behalf of his client, rather than as an amicus curiae. (Anders v. California, supra).

• A Missouri practice -- where the State's Supreme Court would require the preparation of a transcript for appeal and then consider question(s) raised by a motion for a new trial on the basis of pro se briefs by the convicted indigent defendant (or

on no briefs at all), where trial counsel had withdrawn from case after making the motion and filing the notice of appeal -- was unconstitutional, even when the motion and notice of appeal specifically designated the issues for direct appeal. (Swenson v. Bosler, 386 U.S. 258, 87 S. Ct. 996 (1967)).

• A New York statute was unconstitutional which denied a free transcript of a preliminary hearing to an indigent criminal defendant. (Roberts v. LaVallee, 389 U.S. 40, 88 S. Ct. 194 (1967)).

• The Fourteenth Amendment requires that an indigent defendant convicted for violation of a city drunken driving ordinance (and sentenced to 90 days in jail and a $50 fine) is entitled to the requisite "case-made" (or transcript) at city expense in order to perfect an appeal from such conviction. (Williams v. Oklahoma City, 395 U.S. 458, 89 S. Ct. 1818 (1969)).

• See also: Wade v. Wilson, 396 U.S. 282, 90 S. Ct. 501 (1970); Gardner v. California, 393 U.S. 367, 89 S. Ct. 580 (1969); Long v. District Court of Iowa, 385 U.S. 192, 87 S. Ct. 362 (1966); Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917 (1962); Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S. Ct. 1061 (1958); Mayer v. City of Chicago, 404 U.S. 189, 92 S. Ct. 410 (1971); Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431 (1971).

The reason why the Supreme Court, and many other courts, both federal and state, have invested appellate matters with such sanctity is because it has long been recognized that an appeal constitutes an opportunity to correct legal errors

which may have occurred below. In other words, before one is deprived of life, liberty, or property, government must be as certain as it can. "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts." (Griffin v. Illinois, supra, at 17,590). Indeed, apart from the appellate process itself, other safeguards have been created and exist in connection with probation/parole revocation to assure that no deprivations will occur until fairness and near-certainty have been achieved:

• Connecticut itself affords a probationer a hearing with respect to revocation (General Statutes §53a-33), in the name of ascertaining fairly and with as much certainty as possible that he deserves to be jailed.

• Connecticut itself apparently considers its appellate process of such importance that the state does not administratively review sentences which are being appealed, until the appeal is concluded. (A-36).

• Nor, apparently, will Connecticut press revocation (at least in some cases) until at least after conviction, as here.

• In Morrisey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972) and in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973), the Supreme Court expressed great concern for various

elements of procedural fairness at revocation hearings, with a special emphasis on the importance of and necessity for counsel, appointed if need be.

Appellant contends, as we have said supra, "that although probation can be revoked without a conviction, or on a conviction alone, once an appeal is taken the equation is drastically changed, and the Constitution then prohibits revocation before the probationer's direct appellate rights are exhausted." This is so not only because of what we have already said about the high place given the appellate process and its incidents in our constitutional hierarchy, and not only because of the scrupulousness with which courts today monitor the rights of prisoners/probationers/parolees, but for a host of other constitutional reasons as well.

Quite apart from the general procedural safeguards found in the Fifth and Sixth Amendments (via the Fourteenth), the Eighth Amendment is crucially involved in this issue of probation revocation based on a non-final conviction. The Eighth Amendment's requirement that "/ex/cessive bail shall not be required ...." plainly recognizes that under our system of constitutional justice an accused, and even a convicted defendant who is appealing, have an absolute right to be free until their cases have been finally disposed of -- except, of course, in the extremely small group of cases which are not bailable, eg., capital cases. (See Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525 (1952)). Needless to say, Appellant's/robbery convictions were, by themselves, bailable pending appeal. Yet despite what Justice Black referred to as the "plain purpose

of our bail Amendment" -- "to make it impossible for any agency of Government ... to authorize keeping people imprisoned a moment longer than was necessary to assure their attendance to answer whatever legal burden or obligation might thereafter be validly imposed upon them (Carlson v. Landon, supra, at 342 U.S. at 558, 72 S. Ct. at 543) -- here Appellant's constitutional right to bail pending appeal of his robbery convictions was rendered wholly nugatory by Connecticut's use of those same non-final convictions to incarcerate him on the probation revocation. In short, if Connecticut, or any other jurisdiction, has the power to revoke probation pending direct appeal, as of right, of a new conviction, the right to bail on that conviction, supposedly guaranteed by the Eighth and Fourteenth Amendments, is effectively destroyed. In addition, other consequences flow from the denial of bail. "Studies have shown ... other adverse effects upon the accused's preparation for trial ... the outcome of the trial, and the severity of the sentence. For example, in preparation for his trial, the defendant who remains in jail does not have the same access to his counsel as the man free on bail. He is limited in his ability to collect witnesses...." (See 56 Georgetown Law Journal 705, 713 (1968)).

Although they were not necessarily rooted in the reasons advanced here -- the presumption of innocence; the necessity for proof beyond a reasonable doubt; the constitutional importance of appeals and the incidents thereof; the procedural safeguards surrounding prisoner rights and probation/parole revocations; etc. -- there are a few state cases which have drawn on such theories in order to preclude revocation of

probation and incarceration of the probationer when, as here, he is actually engaged in the very procedure which has been created to assure that he was properly convicted in the first place. (See, for example, Harris v. State, 331 S.W. 2d 941 (Tex. Crim. App. 1960)).

Moreover, if, as Judge Mansfield said for this court in United States v. Wilson, 469 F.2d 368 (2 Cir. 1972), "Revocation of probation solely because of impecunity would not only be of doubtful constitutionality ... but would probably be an abuse of discretion, since the result would be to punish for poverty" (469 F.2d at 370), then Appellant fails to understand how revocation of his probation can be constitutional when it is based solely on a non-final conviction from which he had the right to appeal, and which would not have resulted in the incarceration of anyone else not a probationer or parolee -- he fails to understand how the law can constitutionally punish him not for impecunity or poverty, but for what might turn out eventually to have been a legal error.

The most eloquent way to close this point is to look to the Connecticut Supreme Court itself. Despite the fact that it was actually affirming Appellant's revocation, based on his non-final robbery convictions, that court nonetheless recognized that under Connecticut law (and in other states as well; see, eg., State ex rel. Roberts v. Cochran, 140 So. 2d 597 (Fla. 1962); Clay v. Wainwright, 470 F.2d 478 (5 Cir. 1972)):

> ... if conviction is the sole ground for revocation [as it was here] and

> the conviction is reversed, then the basis for the revocation no longer exists [citing cases]. (A. 39).

In other words, Connecticut admits that it may turn out that there was never any basis on which to revoke Appellant's probation. It states the obvious to observe that if "the basis for the revocation no longer exists" -- as Connecticut admits will happen here if Appellant wins his appeal -- then Appellant will have been in prison for years utterly without cause, and, we claim, utterly unconstitutionally. If Appellant had been free pending his appeals, the state would in no way have been hurt. On the other hand, if a non-final conviction up on appeal can serve as the predicate for probation revocation as it did here when the Appellant (whomever he may be) wins his appeal, how then will the state return to him the months or years illegally and unconstitutionally taken out of his life? Connecticut answers that the revocation will be withdrawn. (A.39).

That is no answer at all! For if Appellant's robbery convictions are reversed on appeal, he will by then have served 2-4 years and 4-8 years on charges of which he was innocent, and thereafter another 2-5 years on the wrongly revoked original suspended sentence, triggered by the invalid robbery convictions. In other words, Appellant will have spent years of his life in prison, for absolutely no valid reason at all.

Accordingly, he must be released.

POINT II

APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN 6 MONTHS ELAPSED BETWEEN HIS ARREST ON ROBBERY CHARGES AND THE FILING OF AN INFORMATION, WHEN 1 YEAR ELAPSED BETWEEN THE FILING OF THE INFORMATION AND HIS TRIAL ON ONE ROBBERY CHARGE, AND WHEN NEARLY 1½ YEARS ELAPSED BETWEEN THE FILING OF THE INFORMATION AND HIS TRIAL ON THE OTHER ROBBERY CHARGE

For reasons which do not appear in the record of this case, it appears that from January 18, 1970 -- when Appellant was arrested on the robbery charges, and incarcerated either for that reason or as an alleged probation violator (A.21) -- until June 16, 1970, when the robbery Information was filed (A.22), no charges had been laid against him at any time during those 6 months.

It also appears that from the time of the Information (June 16, 1970 (A.22)), 1 year elapsed before Appellant was tried on robbery count 1 (A.21, 22) and 1½ years elapsed before he was tried on robbery count 2 (A.22) -- actually, the time between arrest on January 18, 1970 and trial on the two robbery counts was 1½ years and nearly 2 years, respectively.(3)

Accordingly, Appellant contends that his Sixth and Fourteenth Amendment rights to a speedy trial have been violated, necessitating reversal of his robbery convictions. (See Smith v. Hooey, 393 U.S. 375, 89 S. Ct. 575 (1969)).

---

(3) Point III, infra, discusses the constitutional consequences of the fact that although Appellant was arrested for the robberies on January 18, 1970, charged on June 16, 1970, and tried on June 30, 1971 and October 1, 1971, his appeals from the robbery convictions have still not been heard.

In Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564 (1970), the Supreme Court forcefully noted that:

> The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed .... State claims have never been favored by the law, and far less so in criminal cases .... the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. (398 U.S. at 1568-1569, 90 S.Ct. at 37-38).

In their Dickey concurring opinion, Justices Brennan and Marshall enlarged on the majority's conclusion:

> /The Sixth Amendment/ is intended to spare an accused those penalties and disabilities - incompatible with the presumption of innocence - that may spring from delay in the criminal process. (398 U.S. at 1570, 90 S. Ct. at 41).
>
> ... prejudice seems to be an essential element of speedy-trial violations.... It is obvious, for example, if the accused has been imprisoned for a lengthy period awaiting trial.... (39 U.S. at 1576, 90 S. Ct. at 53).

Under the Federal Rules, unfortunately inapplicable here, dismissal is authorized if there is unnecessary delay in indicting or in filing an information, or in bringing a defendant to trial (F.R. Crim. P. 48(b)). In this Circuit, the 6 month rule is designed to serve the same end. While these provisions may exist by force of statute and/or supervisory power, Appellant contends that the same result is required by the Sixth Amendment via the Fourteenth; surely the Constitution must require a more stringent standard than does statute or rule, not a lesser one. (See Moore v. Arizona, ___ U.S. ___, 94 S. Ct. 188 (1973)).

Measuring what has happened to Appellant by the factors recently identified by the Supreme Court when analyzing a claim that a speedy trial has been denied, the conclusion is warranted that Appellant's constitutional rights have indeed been violated: the length of the delays is set forth above; as yet, the State has not even attempted to justify the delays; we understand that Appellant in no way acquiesced in the delays; and the prejudice to him is manifest, especially when one recognizes that while Connecticut was holding Appellant on the uncharged and then untried robberies, the State could claim that he was a probation violator and thus "rightfully" hold him for that. (See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972)).

As to the remedy to which Appellant is entitled, the charges must be dismissed. (Strunk v. United States, ___ U.S. ___, 93 S. Ct. 2260 (1973)).

POINT III

APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN, SOLELY BECAUSE OF CONNECTICUT'S INACTION (AND ITS ARCHAIC APPELLATE PROCEDURES), HIS APPEALS HAVE STILL NOT BEEN HEARD FROM ROBBERY CONVICTIONS RENDERED ON JULY 9, 1971 AND OCTOBER 8, 1971. THE SENTENCES FOR WHICH APPELLANT HAS ALREADY SERVED.

Assuming arguendo that no unconstitutional delays occurred in the timing of the arrest-information-trial process as it affected Appellant, and also that he had no federal constitutional right to remain at liberty pending appeal from his robbery convictions, Appellant contends that he did (perhaps precisely for these reasons) have a federal constitutional right to have those appeals processed with dispatch, and that the delay to which his appeals have been subjected by the state has violated that right.

Under Connecticut appellate procedure the following steps are required:

1. The appeal must be filed within 20 days of final judgment. (Connecticut Practice Book, §601, hereafter "CPB").

2. Because, at the time the appeal is originally filed, the Appellant is required to submit a "request for finding" and a "draft finding" (of the evidence and legal rulings from which error is alleged)[4] (CPB §629), it is necessary

(4) Connecticut criminal appeals involving error not apparent on the face of the record must be supported by a document (in addition to the trial transcript) containing "under separate headings, a statement, in consecutive numbered paragraphs, of the relevant and material facts proven, the conclusions of the court, the claims of law made in the trial court with the rulings of the court thereon, and the rulings on evidence or other rulings on the trial which the appellant desires to have reviewed." (CPB §614). This often runs hundreds of pages.

forthwith to obtain .....

3. A transcript of the trial proceedings, because each paragraph of the draft finding must contain "... a reference to the page or pages of any transcript ... where the evidence supporting the finding or proposed finding, or where the ruling appears." (So, the draft finding cannot be completed until after the trial transcript has been prepared).

4. After the appellant submits his draft finding, the appellee has ten days to submit counterfindings. (CPB §631).

5. Then, the trial court has another two weeks in which to prepare the actual finding. (CPB §634).

6. Corrections to the court's finding must be submitted as soon as practicable. (CPB §636).

7. The appellant's assignment of errors is due ten days after any corrections are made. (CPB 612).

8. Once the foregoing is completed, the record is complete, and the appeal is docketed in the Connecticut Suprme Court. (CPB § 683).

9. The appellant's brief is then due within forty-five days, the appellee's brief within thirty days later, and there are twenty more days thereafter for reply briefs. (CPB §724).

10. After the briefs are in, the appeal is assigned for oral argument at the next monthly term of the court. (CPB §711).

Thus, it would appear that Connecticut appellate procedure contemplates about six months (give or take a month) between conviction/appeal and argument in the Supreme Court.

However, two elements of that procedure -- neither of which were in Appellant's control, and both of which were exclusively within the state's control -- combined here to make a sham out of any supposed statutory right to a prompt appeal. One was the state's control over the transcript, which is the key to Appellant's draft finding. The other was the state's control over preparation and submission of its counterfindings, which is the key to the trial court's actual finding, and thus to the preparation and movement of the appeal itself.

In view of the foregoing, it is instructive to review the chronology of what happened here with regard to the appeal of Appellant's robbery convictions:

- July 9, 1971: sentence and appeal of robbery count 1. (A.21,22).
- August 6, 1971: trial counsel ordered the transcript. (A.47).
- October 8, 1971: sentence and appeal of robbery count 2. (A.22, 32).
- November, 1971: trial counsel ordered the transcript. (A.47).
- December, 1972: sixteen and thirteen months, respectively, after the transcripts were ordered, the state delivered them (approximately 2,000 pages) (A.47).
- August, 1973: draft findings on both robbery convictions were filed by Appellant's counsel. (A.47).
- January 14, 1974: <u>after</u> Appellant's two petitions for habeas corpus, <u>after</u> Appellant's motion in the Connecticut Supreme Court to dismiss the judgments of conviction because of the state's failure to process the appeal, and 5 months <u>after</u> Appellant's

counsel filed the draft findings on both robbery convictions, the state filed its counterfinding only as to the robbery count 1 conviction. (A.48).

• March 5, 1974: the court's finding in robbery conviction 1 is filed. (A.48).

• March 20, 1974: the date this brief will have been filed -- and still no counterfinding from the state in the appeal from the robbery count 2 conviction.

Thus, as to the robbery count 1 conviction, the record can now be printed; then the briefs must be printed, served, filed, etc., all of which takes at least 3 months (excluding any extensions of time); then oral argument will first be scheduled -- nearly thirty-three months after the conviction.

As to the robbery count 2 conviction, because of the state's outstanding counterfinding the case is nowhere near the Connecticut Supreme Court -- nearly twenty-nine months after the conviction.

From the above, it is apparent that the state has been solely responsible for at least two substantial delays in the processing of Appellant's apppeals:[5] (1) the sixteen and thirteen months respectively between August 1971/November, 1971, when the transcripts were ordered, and December, 1972, when they were delivered;

(5) We have no opinion as to the cause of the eight month period between counsel's receipt of the transcripts in December, 1972, and his filing of draft findings in August, 1973, although we note that the transcripts were of two trials, pre-trial motions, and a hearing on a challenge to the array, and were comprised of some 2,000 pages. (A.47).

and (2) the 5 months between August, 1973, when Appellant's draft findings were filed as to both robbery convictions, and January 14, 1974, when the state's counterfinding on the robbery count 1 conviction was filed; and the 7 months (so far) between August, 1973, and today with regard to the state's counterfindings on the robbery count 2 convictions which still have not been filed.

Accordingly, the state-caused delay in the two robbery appeals -- even if Appellant, solely for purposes of argument, takes the blame for the December 1972-August 1973 period -- comes to this: (1) as to robbery count 1, 16 months for the transcript, plus 5 months for the counterfinding: making 21 months before the record is even complete, let alone any of the subsequent appellate steps taking place; (2) as to robbery count 2, 13 months for the transcript, plus 7 months (so far) because of no counterfinding: making 20 months (so far), with no record ready yet, let alone any of the subsequent appellate steps taking place.

Many of the comments made in Point II, supra, concerning speedy trial are relevant also on the issue of speedy appeal. However, there is more to be said about the fact that here one robbery conviction is now 21 months old, and still about a year away from being heard on appeal, and the other 20 months, and still probably two years (at least) away from being heard on appeal.

Appellant contends that the state's delay of his appeals is a per se violation of due process entitling him to reversal of both robbery convictions.

In Way v. Crouse, 421 F. 2d 145 (10 Cir. 1970) a habeas corpus petitioner's state appeal had not been docketed in the Kansas Supreme Court eighteen months after sentencing. The Court of Appeals recognized "that an inordinate, excessive and inexcusable delay may very well amount to a denial of due process cognizable in a federal court. See, e.g., Smith v. State of Kansas, 356 F. 2d 654 (10th Cir. 1966), cert. denied, 389 U.S. 871, 88 S. Ct. 154, 19 L. Ed. 2d 151 (1967)." (Smith involved a one year delay in the processing of a request for post-conviction relief.)

In Dozie v. Cady, 430 F. 2d 637 (7 Cir. 1970) the Court of Appeals was confronted with a 17 month delay. Relying on Smith, and noting that the Fifth and Tenth Circuits have dealt with the problem of unjustifiable delay by reaching the merits, the Court of Appeals remanded to the district court in order to ascertain if the 17 month delay was justifiable. Here, Appellant submits that the delay is prima facie unjustifiable, that thus a remand would only establish what is already apparent and serve only to delay further the proceedings, and that because the delay is unjustifiable he has been deprived of due process of law. Accordingly, Appellant is entitled to reversals.

In that connection, United States v. Massimo, 432 F. 2d 324 (2 Cir. 1970) is of interest. There, Judge Smith, for himself and Judge Hays (Judge Friendly dissented), observed that while a one year delay was "unfortunate," it could not be said to have "amounted to a denial of due process" (432 F.2d 324). We suggest that where, as here, the delay is more than double, and perhaps three or four times as long, the situation moves out of the category of being merely "unfortunate" and into the category of

being a deprivation of due process of law.

Judge Clarie's response to these contentions, when Appellant made them in his petition for habeas corpus, was to accept the state's argument that he had not exhausted his state remedies, to wit., Appellant had not, prior to seeking heabeas corpus, made a motion in the Connecticut Supreme Court pursuant to CPB §696, which the Judge characterized as a "plain, speedy, and efficient state court remedy" (A.7):

> If a party shall fail to prosecute an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, dismiss the appeal or writ of error with costs. If a party shall fail to defend against an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, set aside in whole or in part the judgment under attack, with costs, and direct the entry of an appropriate final judgment by the trial court against the party guilty of the failure. If that party is a defendant in the action, the directed judgment may be in the nature of a judgment by default for such amount as may, upon a hearing in damages, be found to be due. If that party is a plaintiff in the action, the directed judgment may be one dismissing the action as to him, and said judgment shall operate as an adjudication

upon the merits. The statutory provisions regarding the opening of judgments of nonsuit and by default shall not apply to a judgment directed under the provisions of this rule.

Pursuant to this section, it would appear that the Connecticut Supreme Court can rectify a delayed appeal by dismissing the judgment appealed from. (As will be seen infra, this "remedy" is, in practice, more apparent than real.)

Appellant contends that the district court erred because no exhaustion of state remedies was necessary and/or possible, under CPB §696 or for any other reason.

To begin with, it is well-established that the exhaustion requirement of 28 U.S.C. 2254 is not a jurisdictional prerequisite, but only a procedure founded on considerations of comity. (Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822 (1963); Darr v. Buford, 339 U.S. 200, 70 S. Ct. 587 (1950); United States ex rel. Graham v. Mancusi, 457 F.2d 463 (2 Cir. 1972)).

Accordingly, when federal courts have been faced with claims of inordinate delay in state appellate proceedings they have recognized their power (and often duty) to ignore the existence of real or supposed state remedies. (See especially United States ex rel. Johnson v. Rundle, 286 F. Supp. 765 (E.D. Pa. 1968) involving a 19 months delay, 10 months of which was due to the state's failure to provide a transcript. See also Dixon v. Florida, 388 F.2d 424 (5 Cir. 1968), 19 months delay; West v. Louisiana, 478 F.2d 1026 (5 Cir. 1973), 7 months delay; Smith v. Kansas, supra, 15 months delay; Jones v. Crouse, 360 F.2d 157 (10 Cir. 1966),

18 months delay; United States ex rel. Graham v. Mancusi, 457 F.2d 463 (2 Cir. 1972), 7 year delay; United States ex rel. Lusterino v. Dros, 260 F. Supp 13 (SDNY 1966), 20 months delay; United States v. Deegan, 268 F. Supp. 580 (SDNY 1967), 2 year delay. (See also Way and Dozie, supra.) By the standards of these cases, the delays here must necessarily be deemed inordinate and thus exhaustion of state remedies, if any existed, cannot have been required.

This conclusion is also compelled when several other facts are recognized:

• Appellant was pro se in his habeas corpus petition, and thus cannot be expected to have been aware of procedural niceties; and cannot be prejudiced thereby, especially in a plain error situation; and, much more important,

• The only even arguable avenue open to Appellant for purposes of exhaustion was the very state appellate process which had caused the delay of which he complained and which forced him into the federal district court in the first place;

• Indeed, proof that Appellant had no avenue of exhaustion under CPB §696 -- to which Judge Clarie directed him -- is found in the fact that after his petition was dismissed for failure to exhaust, Appellant did make a CPB § 696 motion. It was denied (A.43), and the unperfected appeals linger on. (Perhaps now Judge Clarie would deem Appellant's state remedies exhausted).

• Moreover, even before Appellant's habeas corpus petition was filed, he had no real state remedies to exhaust, despite the existence of CPB §696. This is because section 696 contemplates

a situation where a party to an appeal is to blame for the delay, not where, as here, the delay is caused not only by the state's failure to process an appeal promptly, but also because of the state's utter inability to do so due to the unwieldy and archaic nature of its appellate processes. In short, CPB §696 -- involving "Lack of Diligence in Prosecution or Defending Appeal -- has no application here because the state appellate system itself is unworkable.

CONCLUSION

BECAUSE APPELLANT HAD A FEDERAL CONSTITUTIONAL RIGHT NOT TO HAVE HIS PROBATION REVOKED UNTIL THE CONVICTION ON WHICH REVOCATION WAS BASED HAD BECOME FINAL, OR BECAUSE HE WAS DEPRIVED OF A SPEEDY TRIAL, OR BECAUSE HE WAS DEPRIVED OF A SPEEDY APPEAL, HIS ROBBERY CONVICTIONS SHOULD BE REVERSED AND THE REVOCATION OF HIS PROBATION NULLIFIED.

Submitted by,

HENRY MARK HOLZER
Assigned Counsel for Relator-Appellant*

ERIKA HOLZER,
On the brief

(March 1974)

*Professor Holzer wishes to express his thanks to Brooklyn Law School, which made available secretarial and other facilities necessary to the preparation of this brief and appendix; to John R. Williams, Esq., Appellant's Connecticut counsel, for background information unavailable elsewhere; and also to the Legal Clinic, University of Connecticut School of Law, especially David Golub, Esq., for certain data regarding Connecticut's appellate processes.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jasper Roberson	:	
	:	
Relator - Appellant,	:	
	:	Docket No. 74-1072
- against -	:	
STATE OF CONNECTICUT	:	
	:	
Respondent - Appellee.	:	

On Appeal From The Denial of a Petition For a Writ of Habeas Corpus (By Clarie, United States District Judge, In The United States District Court For The District of Connecticut)

APPENDIX FOR RELATOR-APPELLANT - JASPER ROBERSON

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JASPER ROBERSON :

:

-vs- : Civil No. H-180

:

CARL ROBINSON, Warden, :
Connecticut Correctional
Institution, Somers :

RULING ON PETITION FOR
WRIT OF HABEAS CORPUS

The petitioner, Jasper Roberson, an inmate at the Connecticut Correctional Institution at Somers, seeks a writ of habeas corpus, alleging that his incarceration as a probation violator is in violation of his rights under the United States Constitution. His petition is dismissed for failure to comply with the exhaustion of state remedies provision of 28 U.S.C. § 2254(b).

A brief recitation of the facts leading to the petitioner's incarceration is essential to an understanding of the posture of his claims. On January 9, 1970, the petitic was sentenced to a term of not less than two nor more than five years in state prison. Execution of that sentence was suspended, and the petitioner was placed on probation for three years. While on probation, the petitioner was found guilty of robbery and was sentenced on July 9, 1971, to a term of not less than two nor more than four years in stat

prison. On October 1, 1971, the petitioner was found guilty of still another crime, robbery with violence.

As a result of his October conviction, the petitioner was sentenced on October 8, 1971, to a term of not less than four nor more than eight years in state prison. This sentence was made concurrent with the two to four year sentence which had been imposed on July 9, 1971. After a full hearing on October 9, 1971, the petitioner's probation was revoked, and the Court ordered that the petitioner's January 9, 1970, sentence be executed consecutively to the sentence imposed as a result of his conviction of robbery with violence.

At the time of the petitioner's probation revocation hearing, his robbery conviction was in the process of appeal, and his robbery with violence conviction was about to be appealed. Claiming that the Superior Court erred in revoking his probation while the convictions which formed an underlying basis for the revocation were either on appeal, or about to be appealed, the petitioner appealed that Court's probation revocation order to the Connecticut Supreme Court. The Supreme Court found no error. State v. Roberson, 34 Conn. Law Journal No. 51, June 19, 1973. The petitioner then sought habeas corpus relief, claiming a violation of an alleged "federally protected right to a suspension of the revocation order during the pendency of . . . appeal from the conviction that triggered the revocation." Roberson v. Robinson, Civil No. H-165 (D. Conn. September 13, 1973) at 2-3.

Noting that no such federal right exists, the Court denied relief. The approach now taken by the petitioner combines elements of his earlier, unsuccessful claim for habeas relief with new allegations that he has been denied appellate review of those underlying convictions by a "lack of diligence on the part of the state . . . ," in defending the appeals.

That portion of the petitioner's application which asserts a federally protected right to retain his probationary status pending the outcome of his appeals is directly contrary to Judge Newman's ruling in Roberson v. Robinson, supra, and the numerous authority set forth in the Connecticut Supreme Court's opinion in State v. Roberson, supra. The law is clear that

> "Probation may be revoked when a judge is satisfied that a state or federal law has been violated, and conviction is not a prerequisite. Kirsch v. United States, 173 F.2d 652, 654 (8 Cir. 1949); Neely v. United States, 151 F.2d 533 (5 Cir. 1945); Jianole v. United States, 58 F.2d 115, 117-118 (8 Cir. 1932); Riggs v. United States, 14 F.2d 5, 10 (4 Cir.), cert. denied, 273 U.S. 719, 47 S.Ct. 110, 71 L.Ed. 857 (1926). Moreover, if a criminal prosecution has been started based upon probationer's conduct the probation court need not await conclusion of those proceedings. United States ex rel. McLaren v. Denno, 173 F.Supp. 237, 241 (S.D.N.Y.), aff'd on opinion below, 272 F.2d 191 (2d Cir. 1959), cert. denied, 363 U.S. 814, 80 S.Ct. 1252, 4 L.Ed. 2d 1155 (1960); Jianole v. United States, supra." United States v. Markovich, 348 F.2d 238, 240 (2d Cir. 1965).

It was well within the trial court's discretion to revoke petitioner's probation upon his conviction and its finding that the petitioner engaged in the behavior which led to the conviction while on probation.

The petitioner's remaining claim, that he has been denied "Appellate review due to lack of diligence on the part of the state . . . ," must be considered in light of his complete failure to assert his claim of delay in the state court system; his May 30, 1973 parole to his consecutive probation violation sentence; and the state court's findings in State v. Roberson, supra. The essence of this claim is that "the state's processing the appeal of the violation of the probation before those of the charges from which the violation of probation stems, was but a tactic to delay the hearing of the robbery appeals and to gain an easy victory on the violation of probation appeal."

The state and the petitioner are in agreement that the petitioner has been paroled from his sentences for robbery to his consecutive sentence imposed for violation of probation. Both parties are also in agreement that the petitioner has never raised in any state court proceeding the issue of the state's alleged delay in defending the petitioner's robbery and robbery with violence convictions. Relying upon West v. Louisiana, 478 F.2d 1026 (5 Cir. 1973), and Dixon v. Florida, 388 F.2d 424 (5 Cir. 1968), however, the petitioner

urges that "delay is reason enough for waiving the exhaustion requirement."

While West v. Louisiana, supra, does stand for the proposition that an inordinate, unjustified delay may in some instances warrant a waiver of the requirement of exhaustion of state remedies, that decision is clearly inapposite in the present case. Not only was delay not the sole circumstance which led the West court to waive the exhaustion requirement, but the state there implicitly acknowledged the insubstantiality of its interest in further litigating West's claim. 478 F.2d at 1034-1035. These circumstances, together with the fact that a direct connection existed between the delay and West's incarceration, formed factual background for the Court's conclusion that "the need to assure prompt protection for federal rights . . . supersedes the policy in favor of deference to state judicial processes . . . ." The petitioner's other authority is equally inapplicable, see Dixon v. Florida, supra, 388 F.2d at 425 n.3.

In the present case, the connection between the petitioner's incarceration and the state's alleged delay in defending the appeals of his robbery and robbery with violence convictions is tenuous at best. The petitioner is not presently incarcerated under the sentences which are the subject of the pending appeals before the Connecticut Supreme Court

Rather, he has been paroled to his consecutive sentence and is incarcerated solely as a probation violator. Thus, the petitioner's incarceration does not depend for its legality upon the outcome of the appeals which he claims the state has delayed. Instead, the petitioner's incarceration as a probation violator is predicated upon a revocation order which rests on two bases; first, that the petitioner was convicted of a crime; and second, that he engaged in the behavio which led to the conviction while on probation.[1/] Each of these bases is sufficient in itself to justify the petitioner's present incarceration. United States v. Markovich, supra: United States v. Carrion, 457 F.2d 808, 809 (9 Cir. 1972); United States v. Chambers, 429 F.2d 410, 411 (3 Cir. 1970); Amaya v. Beto, 424 F.2d 363, 367 (5 Cir. 1970); Gross v. Bishop, 377 F.2d 492, 494-495 (8 Cir. 1970).

Much of the petitioner's argument is based on the assumption that he will prevail on the merits of his robbery and robbery with violence appeals and yet be no better off than if he had not prevailed, since he has already served those sentences and has now been paroled to his probation violation sentence. Neither of these assumptions is warranted. The petitioner's appeals are currently pending before the Connecticut Supreme Court. It is at least as likely that the state will prevail and that the petitioner's convictions will

be affirmed. While the ultimate resolutions of those appea in the petitioner's favor could conceivably provide a clai that his present sentence should be modified to compensate for time previously served under a conviction that is subsequently vitiated, the existence of such a possibility do not render illegal the petitioner's present incarceration a probation violator. The Connecticut Supreme Court should not be deprived of the opportunity to review those convictions.

The state's interest in litigating the petitioner's claims is clearly substantial. The appeals which the state is accused of delaying[2] in order to achieve an "easy victor in the petitioner's probation revocation appeal are curren pending before the Connecticut Supreme Court. That Court certainly capable of construing its own rules of appellat procedure and safeguarding the constitutional rights of s court litigants. The petitioner's objection that he has confidence in the State of Connecticut" does not warrant priving the Connecticut Supreme Court of an opportunity t test the merits of the petitioner's heretofore unasserted claim of delay on the part of the State. This is especial so in view of the fact that Section 696[3] of the Connecticu Practice Book provides the petitioner with a plain, speed and efficient state court remedy.

The petition is dismissed for failure to exhaust state remedies. SO ORDERED.

Dated at Hartford, Connecticut, this 9th day of November, 1973.

United States District Judge

FOOTNOTES

1/ In addressing itself to the petitioner's claim that the Superior Court's revocation order was predicated solely on a finding that the petitioner had been convicted of a crime the Connecticut Supreme Court observed:

> "He relies on the fact that the court did not make an express finding that the defendant did the acts which led to his conviction but only found that the defendant ' has violated the terms of his probation . . . upon being convicted of a crime.' The ardor with which this contention has been pressed is in strong contrast to its lack of merit. As we have already noted, the defendant agreed with the contents of the violation report of the probation department. That report, whose contents were expressly made a part of the court's findings, recited the facts leading to the defendant's arrest and conviction for robbery, the fact and the date of the conviction and that the incident occurred on January 13, 1970, four days after the defendant was placed on probation. The report itself recites and simple logic demonstrate that the conviction relied on by the court occurre and was premised on behavior that could only have occurred, while the defendant was actually on probation. The defendant admitted as much at the hear ing." State v. Roberson, supra, at 3.

2/ The state's return not only urges that it did not process any of the petitioner's appeals, but that any delay which may have resulted was occassioned by the petitioner himself. That return represents

7/9/71:

> "~~The Petitioner~~'s appeal from the judgment of January 9, 1971 on his robbery conviction, is still pending before the Connecticut Supreme Court. This appeal was filed July 12, 1971 which was beyond the twenty day limit provided by the State rule but the State did not object to the extensions requested by the Defendant. See Connecticut Practice Book sec. 601. The Defendant's request for finding and draft findin which, after the appeal is taken, is the next stage of the State Appellate Procedure, Connecticut Practice Book, sec. 613, was not filed until August

FOOTNOTES cont'd:

10, 1973. At present the State has received an extension of time from the trial judge within which to file the appropriate counterfinding."

. . . .

"The Petitioner's appeal from the judgment of October 8, 1971, on his robbery with violence conviction was taken on November18, 1971. The required request for finding and draft finding was not filed until August 14, 1973. Again the State made no objections to the Defendant's motions for extension. As with the Defendant's other conviction, the State has secured an extension of time within which to file its counterfinding."

3/ Connecticut Practice Book, Section 696, deals specifically with "Lack of Diligence in Prosecuting or Defending Appeal." That section provides:

"If a party shall fail to prosecute an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, dismiss the appeal or writ of error with costs. If a party shall fail to defend against an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, set aside in whole or in part the judgment under attack, with costs, and direct the entry of an appropriate final judgment by the trial court against the party guilty of the failure. If that party is a defendant in the action, the directed judgment may be in the nature of a judgment by default for such amount as may, upon a hearing in damages, be found to be due. If that party is a plaintiff in the action, the directed judgment may be one dismissing the action as to him, and said judgment shall operate as an adjudication upon the merits. The statutory provisions regarding the opening of judgments of nonsuit and by default shall not apply to a judgment directed under the provisions of this rule."

NOV 26 1973

NEW HAVEN

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NOV 20 3 46 PM '73

U.S. DISTRICT COURT
HARTFORD, CONN.

JASPER ROBERSON	::::	
	::::	
vs.	::::	CIVIL ACTION NO. H-180
	::::	
CARL ROBINSON, Warden	::::	
Connecticut Correctional	::::	
Institution, Somers	::::	

JUDGMENT

This cause having come on for consideration by the Court by the Honorable T. Emmet Clarie, United States District Judge, and the Court having filed its Memorandum of Decision November 9, 1973, denying the petitioner's Petition for a Writ of Habeas Corpus for failure to comply with the exhaustion of state remedies provision of 28 USC 2254(b),

It is accordingly ORDERED and ADJUDGED that petitioner's Petition for a Writ of Habeas Corpus be and is hereby dismissed for failure to exhaust his state remedies.

Dated at Hartford, Connecticut, this 20th day of November, 1973.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: _____
Deputy-in-Charge

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

JASPER ROSERSON Plaintiff vs. JOHN R. MANSON Commissioner of Correction, Connecticut Department of Correction, Defendant	)	NOTICE OF APPEAL, AND REQUEST FOR PRODUCTION OF A CERTIFICATE OF PROBABLE CAUSE CIVIL NO. H-180
STATE OF CONNECTICUT COUNTY OF TOLLAND	) ss.:	

NOTICE is hereby given that Plaintiff hereby appeals to the United S States Court of Appeals for the Second District, Second Circuit from the Judgement by Honorable T. Emmet Clarie, on November 9, 1973, against Plaintiffs' petition for a Writ of Habeas Corpus, entered in this action September 26, 1973.

Plaintiff request, pursuant to rule 34 of the Federal Rules of Civil Procedure, that the court clerk of the United States District Court for the District of Connecticut produce for inspection and copying a CERTIFICATE OF PROBABLE CAUSE. PLEASE TAKE NOTICE that the above requested document shall be produced for inspection and copying at the Connecticut Correctional Center at Somers, Connecticut by December 3, 1973, to the above named Plaintiff.

JASPER ROSERSON, Plaintiff
In Persona Propria

DATED: November 26, 1973
at Somers, Connecticut

Subscribed and sworn to before me
this 26th day of November, 1973

NOTARY PUBLIC

My Commission Expires Mar. 31, 1975

A-12

UNITED STATES DISTRICT COURT

Jury demand date:

TEC

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
JASPER ROBERSON	For plaintiff: Pro Se C.C.I. Box 100 Somers, Conn.
V.	
STATE OF CONNECTICUT	For defendant: Jerrold H. Barnett, Assistant States Attorney 8 Lunar Drive Woodbridge, Conn 06525

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB
J.S. 5 mailed	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Writ of Habeas Corpus	Docket fee					
	Witness fees					
Action arose at:	Depositions					

A-13

H 188

	PROCEEDINGS	Date Ord Judgment
3		
24	1. WRIT OF HABEAS CORPUS and Petition to file in forma pauperis filed.	
	2. ORDER TO FILE ANSWER (Clarie, J.) M- 9/27/73	
	Marshal's Form 285 issued and together with Writ and Order handed to Marshal for service on Robt. Killian, Atty. General. Copy mailed to S. O'Neill.	
3	3. Marshal's return showing service .	
9	4. APPEARANCE of Jerrold Barnett entered for defendant.	
n	5. RETURN TO PRO SE APPLICATION FOR A WRIT OF HABEAS CORPUS, filed, with exhibits.	
17	6. Petitioner's Response to Reslondent's Return to Pro Se Application for a Writ of Habeas Corpus, filed.	
9	RULING ON PETITION FOR WRIT OF HABEAS CORPUS, filed. Clarie, J.m 11-14-73	
	Copies mailed to petitioner and counsel of record.	
-21	8. JUDGMENT entered. Copies mailed to petitioner and counsel of record.	
	M-11-26-73	
1-26	9. Notice of Appeal and Request for Production of a Certificate of Probable Cause filed.	
10	"Motion for Certificate of Probable Cause is Granted without payment of	
	Fee, So Ordered, Clarie, J. m Copy mailed to Petitioner & J. Barnett,	
	Assistant State Attorney.	
-74	Certificate of Probable Cause mailed to New Haven for U.S.C.A.	
-74	Notice of Appeal and Certified copy of Docket mailed to New Haven with	
	complete file.	

A True Copy.
ATTEST:
SYLVESTER A. ...
Clerk, U.S. D...
By: ...
Deputy Clerk

A-14

B

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NEW HAVEN COUNTY

JUNE TERM, 1972

7198

STATE OF CONNECTICUT *vs.* JASPER ROBERSON	Superior Court New Haven County October 8, 1971

APPEARANCES

For the Plaintiff:

ARNOLD MARKLE, Esq.
State's Attorney
JERROLD H. BARNETT, Esq.
Assistant State's Attorney

For the Defendant:

JOHN R. WILLIAMS, Esq.
Special Public Defender

Defendant's Appeal from the Superior Court
for New Haven County

Hon. IRVING LEVINE, Judge

TABLE OF CONTENTS

AUG 2 1972

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NEW HAVEN COUNTY

JUNE TERM, 1972

7198

STATE OF CONNECTICUT *vs.* JASPER ROBERSON	Superior Court New Haven County October 8, 1971

APPEARANCES

For the Plaintiff:

ARNOLD MARKLE, Esq.
State's Attorney
JERROLD H. BARNETT, Esq.
Assistant State's Attorney

For the Defendant:

JOHN R. WILLIAMS, Esq.
Special Public Defender

Defendant's Appeal from the Superior Court
for New Haven County

Hon. IRVING LEVINE, Judge

A-17

In the Superior Court held at New Haven, for the County of New Haven, on Nov. 5, 1969.

THE STATE OF CONNECTICUT
vs.
JASPER ROBERSON

Arnold Markle, State's Attorney for the County of New Haven, accuses Jasper Roberson of violation of the State Narcotic Drug Act and charges that at the City of New Haven, on or about July 7, 1969, the said Jasper Roberson did possess or have under his control a quantity of narcotic drug, to wit: heroin, in violation of Section 19-481 (a) of the General Statutes.

Dated: October 31, 1969.

ARNOLD MARKLE
State's Attorney

STATE OF CONNECTICUT

No. 16039

STATE OF CONNECTICUT *vs.* JASPER ROBERSON	Superior Court New Haven County October 8, 1971

Present, Hon. IRVING LEVINE, Judge.

JUDGMENT

The information of Arnold Markle, Attorney to the State of Connecticut, within and for said County, charging Jasper Roberson with the crime of VSNDA 19-481 (a), as by information on file will appear, came to the Superior Court, having criminal jurisdiction, holden at New Haven, within and for the County of New Haven on November 5, 1969, and thence to December 10, 1969 when the prisoner appeared before this Court and for plea said Guilty to said information, and thence to January 7, 1970 when a pre-

sentence report was filed by Lawrence Dragunoff, Probation Officer, and thence to January 9, 1970 when the prisoner appeared for sentence, when the Court found said prisoner guilty in the manner and form as charged in said information, and when the Court entered the following judgment: "Whereupon it is adjudged that said prisoner suffer imprisonment in the State Prison, located at Somers, County of Tolland, for the term of not less than two years, nor more than five years, execution suspended and said prisoner placed in charge of the Probation Officer of the Superior Court for New Haven County for the term of three years, and further ordered that said prisoner report to said Probation Officer as required by said officer and in all respects comply with said officer's orders in accordance with the rules relating to probation officers.",

and said action came thence to the present time when the prisoner appeared before this Court and was heard on a violation of said probation.

The Court finds that the defendant violated the terms of said probation.

Whereupon it is adjudged that the suspension of the sentence ordered by this Court on January 9, 1970 be and is revoked, and that said sentence be and is ordered to be executed.

And it is further adjudged that said prisoner suffer imprisonment in the Connecticut Correctional Institution, Somers for the term of not less than two, nor more than five years, and that said sentence be served consecutive to the sentence imposed by this Court on October 8, 1971 on the second count in case No. 16787, State of Connecticut vs. Jasper Roberson.

By the Court
LEONARD J. GILHULY
Assistant Clerk.

DEFENDANT'S APPEAL FROM ORDER REVOKING PROBATION

In the above entitled action the defendant appeals to the Supreme Court from the order of this court revoking his probation.

Defendant
By JOHN R. WILLIAMS
Special Public Defender
His Attorney

(Filed: 11-18-71.)

REQUEST FOR FINDING

The appellant in the above entitled case respectfully requests a finding of the facts for an appeal to the Supreme Court and submits the draft finding hereto annexed:

The questions of law which he desires to have reviewed are:

1. Did the Court err in revoking his probation?

2. Did the Court err in concluding that he was in violation of the terms of his probation?

The Defendant
By JOHN R. WILLIAMS
Special Public Defender
His Attorney

(Filed: 1-19-72.)

FINDING

FIRST:

Upon the hearing to revoke the defendant's probation, the following facts are found:

1. Jasper Roberson is twenty-five years of age.

2. On December 10, 1969, the defendant after a trial to the jury was found guilty of possession or control of heroin in violation of Section 19-481 (a) of the General Statutes.

3. On January 9, 1970, the defendant was sentenced to the State's Prison for a term of not less than two years nor more than five years, the execution of which sentence was suspended and the defendant placed upon probation for a period of three years.

4. A hearing was held on the defendant's violation of probation on October 8, 1971, before the Honorable Irving Levine, a Judge of the Superior Court.

5. Present at the hearing were John Redway, Assistant State's Attorney, John R. Williams, Esq., attorney for the defendant, the defendant himself, and Leonard Russman of the Department of Adult Probation.

6. The report of the Department of Adult Probation was marked Exhibit A by the Court.

7. Attorney Williams had seen a copy of the report of the Department of Adult Probation (Exhibit A) a few weeks prior to the hearing and both he and the defendant examined it at the hearing.

8. Upon the Court's inquiry to the defendant as to whether he agreed with the contents of the report (Exhibit A) the defendant answered, "Yes".

9. The report (Exhibit A) recited that subsequent to the imposition of the defendant's suspended sentence on January 9, 1970, he was arrested on January 18, 1970, on two charges of robbery with violence and was convicted of robbery for which conviction he received a sentence of not less than two years nor more than four years in the State's Prison, on July 9, 1971.

10. The report (Exhibit A) also recited that there was pending against the defendant another count of robbery with violence.

11. At the date of the hearing on the revocation of the defendant's probation, he had appealed the judgment of July 9, 1971, whereby he had been sentenced to a term of not less than two nor more than four years in the State's Prison, which appeal was then pending.

12. In Case No. 16787 (New Haven County), entitled *State* vs. *Jasper Roberson*, the defendant was charged in a two-count information, dated June 16, 1970, with the commission of two offenses of robbery with violence.

13. On the first count the defendant was found guilty of the lesser crime of robbery on June 30, 1971, and on July 9, 1971, he was sentenced to a term of not less than two nor more than four years in the State's Prison, as stated in Paragraph 9.

14. On the second count the defendant was found guilty, of the crime charge, on October 1, 1971, and on October 8, 1971, he was sentenced to a term of not less than four years nor more than eight years to be served concurrently with the sentence being served on the first count, on which he was sentenced July 9, 1971.

15. The judgments on both the first and second counts in Case No. 16787 preceded the judgment in this case revoking the defendant's probation and ordering execution of the sentence originally suspended. The appeal on the first count in Case No. 16787 preceded the judgment in this case and the appeal on the second count in Case No. 16787 was initiated subsequently and within the time limited. At the time judgment was entered in this case, the defendant's attorney informed the Court that an appeal could be expected on the second count in Case No. 16787.

16. At the date of the hearing on the revocation of the defendant's probation, his attorney represented there would be an appeal from the "present case".

17. At the hearing on the revocation of the defendant's probation, his attorney indicated that the Court could take judicial notice of the defendant's pending files which the Court should do and the facts to be found therefrom are set forth in Paragraphs 12 to 16, inclusive, of this Finding.

18. The reference by defense counsel that an appeal would be taken from the "present case" as set forth in Paragraph 11 of this Finding refers to the appeal on the second count in Case No. 16787 which was tried to the jury before Levine, J.

SECOND:

The following conclusions have been reached:

19. The defendant has violated the terms of his probation included in the sentence imposed on January 9, 1970, upon being convicted of a crime.

THIRD:

The Court made the following orders:

20. The suspension of the sentence ordered by the Court on January 9, 1970, is revoked and said sentence is ordered to be executed.

21. The sentence originally suspended and now ordered executed is not less than two nor more than five years and is to be served consecutive to the sentence imposed on October 8, 1971, for the second count in Case No. 16787.

FOURTH:

22. All exhibits are certified to the Supreme Court, the contents thereof are made a part of this Finding, and the same may be used in argument before the Court without printing.

LEVINE, J.

(Filed: 3-9-72.)

ASSIGNMENT OF ERRORS

The Court erred:

1. In concluding that the defendant violated the terms of his probation included in the sentence imposed on January 9, 1970, upon being convicted of a crime, as recited in Paragraph 19 of the Finding.

The Defendant
By JOHN R. WILLIAMS
Special Public Defender
His Attorney

(Filed: 6-5-72.)

6/7/72. Read. I. Levine, Judge

SUPREME COURT
NEW HAVEN COUNTY } Clerk's Office
July 31, 1972

The above and foregoing is a true copy of the record in said case to be used in the trial in the Supreme Court.

EDWARD HORWITZ, Clerk.

IN THE SUPREME COURT

OF THE STATE OF CONNECTICUT

NO. 16787	)	SUPERIOR COURT
	)	
STATE OF CONNECTICUT	)	NEW HAVEN COUNTY
	)	
VS.	)	AT NEW HAVEN
	)	
JASPER ROBERSON	)	NOVEMBER 27, 1973

MOTION TO SET ASIDE JUDGMENT

Pursuant to Section 696 of the Practice Book, the defendant respectfully moves that this Court set aside the judgments herein as to both the First Count and the Second Count of the Information, and order the Superior Court to enter final judgments therein in favor of the defendant.

In support of this motion, the defendant represents that:

1. As to the First Count, he was found guilty on June 30, 1971, and sentenced on July 9, 1971.

2. As to the Second Count, he was found guilty on October 1, 1971, and sentenced on October 8, 1971.

3. He has been continuously in custody since his arrest on both Counts on January 18, 1970.

4. On October 9, 1971, his probation in another case was revoked solely upon the basis of the convictions herein. Said revocation order was affirmed by this Court. State v. Roberson, 34 Conn. L. J. No. 51, June 19, 1973.

5. On May 30, 1973, the defendant was paroled from his incarceration herein to the aforesaid probation violation sentence.

6. On October 2, 1973, the State was granted an extension of time until November 15, 1973, within which to file its Counter-Finding as to the First Count. No Counter-Finding has been filed and no further extension of time has been requested or granted.

7. On September 29, 1973, the State was granted an extension of time until March 15, 1974, within which to file its Counter-Finding as to the Second Count. The Draft Finding as to the Second Count was filed on August 14, 1973.

8. On September 5, 1973, the defendant filed pro se, in the United States District Court, a petition for writ of habeas corpus upon the ground that he was being denied his right to a speedy appeal in this case. On November 9, 1973, that Court (Clairie, J.) dismissed said petition because of failure to exhaust state remedies -- specifically, a motion pursuant to Section 696 of the Practice Book. A copy of said Order and decision is attached hereto.

9. The instant motion is filed pursuant to the implied direction of the United States District Court aforesaid and to the express direction of the defendant.

10. Upon the aforesaid facts, the defendant respectfully submits that he has been denied a speedy appeal in this case and that he has, therefore, been denied his liberty without due process of law.

THE DEFENDANT

BY: _____

John R. Williams
Special Public Defender
265 Church Street
New Haven, Connecticut 06510

His Attorney

DOCKET NO. 16039	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	AT NEW HAVEN
VS.	:	FOR NEW HAVEN COUNTY
JASPER ROBERSON	:	OCTOBER 8, 1971

HEARING ON VIOLATION OF PROBATION

B E F O R E :

THE HONORABLE IRVING LEVINE, Judge.

APPEARANCES:

JOHN REDWAY, ESQ.
Assistant State's Attorney
121 Elm Street
New Haven, Connecticut

RORABACK, WILLIAMS & AVERY, ESQS.
Attorneys for the Defendant
265 Church Street
New Haven, Connecticut
BY: JOHN R. WILLIAMS, ESQ., of Counsel

Reported by:

Charles H. Dukes
Court Reporter

THE COURT: Now, with respect to the violation of probation, are you ready to proceed on that counselor?

MR. WILLIAMS: Your Honor, I am not. I was not aware that that was going to be done today. I had the impression that the warrant had been filed merely as part of a plea bargaining in this case, and I rather expected there would have to be further discussions about what would have to be done.

THE COURT: It either has to be put into effect or it doesn't. There is no half-way point on it. As I understand it, the claim has been made--as a matter of fact this probation officer spoke to me and wanted to know if it was going to be processed today.

MR. WILLIAMS: What is the term of suspended sentence, your Honor?

THE COURT: Three years, am I correct?

MR. REDWAY: Two to five.

THE COURT: That is the sentence.

MR. WILLIAMS: I suppose we might as well dispose of it.

THE COURT: For the purpose of the record, you are Jasper Roberson?

THE ACCUSED: Yes, sir.

THE COURT: Will you give me your age.

THE ACCUSED: Twenty-five.

THE COURT: Were you sentenced January 9, of 1971, to a term of not less than two and not more than five years for violation of our drug act?

THE ACCUSED: Yes, I was.

THE COURT: And that term was suspended, am I correct, Mr. Roberson?

THE ACCUSED: Yes, sir.

THE COURT: For the record, it may be shown that this defendant is represented by Attorney John R. Williams, and he is present in court. Have you had a copy of the report of the violation of probation by the Probation Department, Mr. Roberson or Mr. Williams?

MR. WILLIAMS: Your Honor, I saw one a long time ago. I don't know that I have it.

THE COURT: Would you like to see one?

MR. WILLIAMS: Yes, I would.

THE COURT: Do you have one, Mr. Russman?

MR. RUSSMAN: We have one.

THE COURT: Will you turn it over?

MR. RUSSMAN: I think Mr. Williams had it a couple of weeks ago. If he doesn't have a copy, we can give him one right now.

THE COURT: Would you like to look at it?

MR. WILLIAMS: I would.

THE COURT: Show it to him. Would you also show it to Mr. Roberson, Mr. Williams, so he may be familiar with it.

MR. WILLIAMS: Yes, we have looked at it.

THE COURT: Are you familiar with the contents of that report, Mr. Roberson?

THE ACCUSED: Yes, sir.

THE COURT: Do you agree with the contents?

THE ACCUSED: Yes.

MR. WILLIAMS: Well, if your Honor please, of course the allegations of this are simply that he has been arrested and convicted. What it fails to show -- I mean it is incomplete in that it fails to note that there is an appeal pending.

THE COURT: Well, I would take notice of that. I will accept your representation. But, that is the only matter in which it varies, Mr. Williams?

MR. WILLIAMS: Well, in addition to that, as I indicated to your Honor when we discussed the sentence in this case, what has been printed here was the State's allegation in that particular robbery, the Ben's Liquor Store robbery, but the jury obviously believed only part of it because they didn't convict him with robbery with violence.

THE COURT: However, the violation of probation is the conviction of any crime, is it not, Mr.

Williams? I realize if it were made different than what you are pointing out. If there is no further reference to the violation, it may be marked as an exhibit for the record. You will not require it, Mr. Redway?

MR. REDWAY: What was that?

THE COURT: It came from your file.

MR. REDWAY: It did come from my file.

MR. WILLIAMS: It is already stamped by the Clerk and apparently filed in this case.

THE COURT: Will you mark that, Mr. Perlman, Exhibit A for the purpose of this.

(State's Exhibit A -- so marked)

THE COURT: With respect to the differences that exist there, would you like the opportunity to present evidence with those? I would accept your statement, Mr. Williams, that there is an appeal pending in the first case and I don't know about the present case.

MR. WILLIAMS: Yes. It would be out expectation an appeal would be filed in this case, if your Honor please.

THE COURT: However, you have that right. And is there any other matter upon which you want to present evidence in which you differ with the repor on?

MR. WILLIAMS: Nothing beyond what I already

indicated to the Court, your Honor. And I think perhaps the Court can take judicial notice of those.

THE COURT: Yes, I will do that. It is the finding of this Court that you have violated in the terms of your probation, and that the suspension of sentence ordered by this Court be revoked and that the sentence is ordered to be executed. That is the term of not less than two nor more than five years. That matter is consecutive to the last sentence that was imposed.

THE CLERK: Sir, at this time, I would like to hand to the defendant with regard to the first sentence notice of right to have sentence reviewed.

THE COURT: He has a right to have sentence reviewed on both the cases in which he appeared before me. Certainly, I don't know about the violation of probation. I don't know about the violation of probation. I don't think so.

MR. WILLIAMS: I should think that --

THE COURT: Because his right to go before the sentence review there is at the time of sentence.

MR. CLERK: I am also handing the defendant application to waive fees, costs and expenses on order of counsel on appeal of judgment of conviction. Will you sign that, please. I am also handing the

defendant notice of right to appeal.

MR. WILLIAMS: Your Honor, I don't want there to be any question about my attempting to be less than candor and mousetrap the Court in any sense. I did make it clear on the record my opinion, or I should say I did make it clear on the record there was an appeal pending in that matter, and I just want the record to note that it is our position that probation cannot be violated as long as the matter is still on appeal, on direct appeal.

THE COURT: I understand your position. Is there anything further here? All right.

* * * * *

DOCKET NO. 16121

STATE OF CONNECTICUT
vs.
Joseph Peterson
(Name)

SUPERIOR COURT
COUNTY OF New Haven
(Place where sentenced)
October 7, 1952
(Date of Sentence)

The undersigned hereby applies to the Review Division of the Superior Court for a review of the sentence imposed by the Court in the above entitled case.

I hereby affirm that I do ~~do not~~ desire counsel to represent me.

NEW HAVEN COUNTY
SUPERIOR COURT
FILED
NOV 15 1971
LEONARD J. GILHULY
ASST. CLERK

On Appeal

Joseph Peterson
(Signature)
November 10, 1971
(Date of Application)
Somers
(Prison)

THIS APPLICATION MUST BE COMPLETED AND FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF YOUR SENTENCE WITH:

Clerk, Superior Court, County of

I-CSP

(1)

SENTENCE REVIEW DIVISION OF THE SUPERIOR COURT

18 Trinity Street
Hartford, Connecticut 06106
Tel. 566-3635

November 19, 1971

Barbara M. Millstein, Ettorney
116 Towne House Rd.
Hamden, Conn.

Re: State Vs. Jasper Roberson
Docket No. 16787

Dear Sir:

The defendant's application for review was not filed within thirty (30) days after sentence, as required under Conn. G.S. 51-195. (A Copy of the application is enclosed).

Where such defect is apparent on the defendant's application for review, the Sentence Review Board does not hear evidence in explanation or mitigation of such late filing, and has dismissed such cases (see State V. Morrissette 29 Conn. Sup. 132, Conn. Law Journal, March 23, 1971; and cases cited.)

THE SENTENCE REVIEW DIVISION WILL TAKE NO FURTHER ACTION IN THIS CASE, pending notification as to whether the defendant

(1) wishes to withdraw his application for review, or

(2) intends to institute other proceedings, or

(3) nevertheless, wishes to have his case assigned for hearing by the Sentence Review Board.

Very truly yours,

(3)

Paul M. Palten
Executive Secretary

PMP:jds
c.c.: Jasper Roberson
John P. Williams, Esq.
P.S. The file indicates that this case is on Appeal. No further action will be taken on this case pending disposition of the appeal.

A-36

Published in Accordance with General Statutes Section 51-16

L. XXXIV No. 51 June 19, 1973 Thirty-four Pag

CONNECTICUT REPORTS

SUPREME COURT

April Term, 1973

STATE OF CONNECTICUT *v.* JASPER ROBERSON

Appeal from an order of the Superior Court in w Haven County, *Levine, J.*, revoking probation d ordering the execution of a previous sentence posed on the defendant. *No error.*

John R. Williams, special public defender, for the pellant (defendant).

Jerrold H. Barnett, assistant state's attorney, with om, on the brief, were *Arnold Markle,* state's torney, and *John T. Redway,* assistant state's at- rney, for the appellee (state).

HOUSE, C. J. This is an appeal from an order of e Superior Court revoking the suspension of a ntence imposed on the defendant. The sole assign- ent of error is that the court erred in concluding at the defendant violated the terms of his proba- on on being convicted of a crime.

The court's finding of facts is not disputed. In ecember, 1969, the defendant was found guilty of ssion or control of heroin. On January 9, 1970, ntence was imposed of not less than two nor ore than five years in the state prison, execution the sentence was suspended and the defendant as placed on probation for three years. On June , 1971, while he was on probation, he was found uilty of the crime of robbery, and on October 1, 971, he was found guilty of still another crime, obbery with violence. At the time of the hearing oncerning the revocation of his probation, the judg- ent on the June, 1971, conviction had been appealed nd the judgment on the October 1, 1971, conviction, ccording to the defendant's counsel, probably would e appealed.

CIRCUIT COURT — FIRST CIRCUIT

Notice

Westport Sessions have been discontinued as of the clo of business on June 18, 1973.

Henceforth, commencing June 19, 1973, all sessio formerly held in Westport will be held in Norwalk an Stamford.

JOHN J. DALY
Chief Judg

Published by the State of Connecticut in accordance with the provisions of General Statutes Section 51-16.

Commission on Official Legal Publications
Office of Production and Distribution
76 Meadow Street, East Hartford, Connecticut 06108
Tel. 528-9317

JOHN J. SWEENEY, JR.
Supervisor

Published Weekly
Subscription Rates: One year—$12.50

Headnotes and Indices of court opinions by

DONALD H. DOWLING, ESQ.
Reporter of Judicial Decisions

SECOND CLASS POSTAGE PAID AT HARTFORD, CONN.

'special public defender; also present at the ng were an assistant state's attorney and an l of the department of adult probation. The tion department's report concerning the de- nt was admitted as an exhibit and both the dant and his counsel examined it. The report, ed "Report of Violation," recited that the de- nt had been placed on probation on January 9, and that on January 18 he was arrested on two s of robbery with violence for an offense which aken place on January 13—four days after the dant had been placed on probation. The re- then recited the details of the January 13, 1970, ry offense, that the defendant was convicted of crime on a jury trial and on July 9, 1971, was nced to state prison for a term of not less than or more than four years. It also noted that was then pending against the defendant nother charge of robbery with violence. Asked he court if he agreed with the contents of probation report, the defendant said, "Yes." hearing afforded the defendant ample oppor- .to explain or disclaim the reported viola- of probation, but he personally expressed greement with the report of his conduct and ctions and offered nothing by way of ex- tion or disclaimer except that the convictions subject to appeal. The court also took judi- notice of the files in the defendant's cases. voked probation and ordered that the January 0, sentence be executed. The court concluded "[t]he defendant has violated the terms of robation included in the sentence imposed on ary 9, 1970, upon being convicted of a crime."

e defendant claims that the court's conclusion ot support the order of revocation for two rea- One is that the judgment originally granting ation constituted an illegal delegation of judi- uthority. That judgment provided, in pertinent that the defendant was to be "placed in charge e Probation Officer of the Superior Court for Haven County for the term of three years, and er ordered that said prisoner report to said ation Officer as required by said officer and in spects comply with said officer's orders in ac- nce with the rules relating to probation rs."

ere is authority that, in the absence of statute der the provisions of statutes different from of this state, the terms of probation, to be must be expressly enunciated by the sentenc- ing court.[1] See, e.g., *In re Collyar*, 476 P.2d 354, 357 (Okla. Crim. App.). Here, however, the sentencing court incorporated the probation department's standard terms by virtue of the last clause of its order. "Standard probation conditions need not be recited in open court." *United States* v. *Markovich*, 348 F.2d 238, 240 (2d Cir.); see also *Manning* v. *United States*, 161 F.2d 827 (5th Cir.), cert. denied, 332 U.S. 792, 68 S. Ct. 102, 92 L. Ed. 374; *Whitehead* v. *United States*, 155 F.2d 460, 462 (6th Cir.), cert. denied, 329 U.S. 747, 67 S. Ct. 66, 91 L. Ed. 644; *Dugas* v. *State*, 12 Md. App. 165, 166, 277 A.2d 620. Furthermore, there is no claim here that the defendant was not aware that commission of a crime would render his probation subject to revocation.

It is universally held that the commission of a felony violates a condition inherent in every probation order. See *United States* v. *Markovich*, supra; *Whitehead* v. *United States*, supra; *State* v. *Oliver*, 247 A.2d 122, 124 (Me.); *People* v. *Compton*, 38 App. Div. 2d 788, 328 N.Y.S.2d 72; *State* v. *Hall*, 4 Ore. App. 28, 476 P.2d 930; *Marshall* v. *Commonwealth*, 202 Va. 217, 219–20, 116 S.E.2d 270. The history of this state's statute, which shows that statutory conditions of probation have, over the years, been added and deleted, in no way affects the valid-

[1] The present statutory provisions, not in effect at the time the defendant was placed on probation, expressly allow either the judge or the probation department, or both, to impose reasonable conditions. See General Statutes § 53a-30.

the inherent condition to refrain from com- felonies. Had the sentencing court in this erely placed the defendant on probation and more, commission of a felony would never- constitute a violation sufficient to authorize tion of probation.

ther contention of the defendant is that "being ted of a crime" is not by itself a sufficient l for revocation of probation in the absence express finding by the revoking court that the lant actually committed the crime of which he ready been convicted and that the crime was tted while the defendant was on probation. lies on the fact that the court did not make press finding that the defendant did the acts led to his conviction but only found that the lant "has violated the terms of his probation pon being convicted of a crime." The ardor which this contention has been pressed is in contrast to its lack of merit. As we have ly noted, the defendant agreed with the con- of the violation report of the probation de- ent. That report, whose contents were ex- y made a part of the court's finding, recited cts leading to the defendant's arrest and con- n for robbery, the fact and the date of the ction and that the incident occurred on Janu- 3, 1970, four days after the defendant was d on probation. The report itself recites and e logic demonstrates that the conviction relied the court occurred, and was premised on be- r that could only have occurred, while the ndant was actually on probation. The defendant tted as much at the hearing.

e defendant's final argument is that a finding nviction of a crime, at least where an appeal the conviction is pending, is not a sufficient nd for revocation of probation. Some jurisdic- s apparently do require an independent inquiry the conduct underlying a conviction which is ect to appeal, although in those jurisdictions the len of proof of the conduct is much less than ond a reasonable doubt" and the strict criminal entiary rules do not apply. See, e.g., *People* v. *pton*, supra; *Jansson* v. *State*, 473 S.W.2d 40, (Tex. Crim. App.); Bassett, "Discretionary er and Procedural Rights in the Granting and oking of Probation," 60 J. Crim. L.C. & P.S. 479,

he vast majority of jurisdictions, however, hold a finding of either conviction, whether or not final, or commission of the act, is sufficient to support an order of revocation. See, e.g., *United States* v. *Carrion*, 457 F.2d 808, 809 (9th Cir.); *United States* v. *Knight*, 413 F.2d 445 (5th Cir.), cert. denied, 396 U.S. 903, 90 S. Ct. 217, 24 L. Ed. 2d 179; *United States* v. *Markovich*, supra; *People* v. *Lynn*, 271 Cal. App. 2d 670, 674, 76 Cal. Rptr. 801; *State ex rel. Roberts* v. *Cochran*, 140 So. 2d 597, 599–600 (Fla.); *People* v. *Johnson*, 121 Ill. App. 2d 97, 257 N.E.2d 121, 124; *State* v. *Ward*, 182 Neb. 370, 154 N.W.2d 758; *State* v. *Hill*, 266 N.C. 107, 111, 145 S.E.2d 349; *State* v. *Hall*, supra. Generally, the distinction arises where the conviction is reversed on appeal. If revocation is based on a finding of conduct, then a reversal of a conviction resulting from the conduct ordinarily does not affect the revocation; but if conviction is the sole ground for revocation and the conviction is reversed, then the basis for the revocation no longer exists. *People* v. *Lynn*, supra, 803; *State ex rel. Roberts* v. *Cochran*, supra, 600; *State* v. *Hill*, supra, 352; *State* v. *Blackwelder*, 263 N.C. 96, 98, 138 S.E.2d 787; note, 59 Colum. L. Rev. 311, 332–33.

There are several cogent reasons for allowing proof of conviction alone to sustain revocation.[3] In this state a probationer is afforded a hearing with respect to revocation. General Statutes § 53a-33. This was also true before the adoption of the Penal Code which became effective October 1, 1971. See former § 54-114, since repealed. If the probationer should not be the person referred to in the conviction, for example, he has an opportunity for explanation. See also *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484, which concerns the related area of parole revocation. Since the standard of proof for revocation is substantially lower than that for conviction (General Statutes § 53a-32 [b]), a conviction is deemed to constitute such overwhelming evidence of commission that the terms functionally are interchangeable in this context. See, e.g., *State* v. *Zachowski*, 53 N.J. Super. 431, 437, 147 A.2d 584. If the conviction should be reversed on appeal, the probationer is protected in that revocation based on conviction alone will be withdrawn if the conviction is successfully appealed.

The standard of review of an order revoking probation is whether the trial court abused its discretion: if it appears that the trial court was reason-

Even in Texas, however, an admitted conviction may constitute valid sole ground for revocation. *Rosemond* v. *State*, 452 S.W.2d 479 (Tex. Crim. App.)

[3] The United States Supreme Court recently stated in the context of parole revocation that "[o]bviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." *Morrissey* v. *Brewer*, 408 U.S. 471, 490, 92 S. Ct. 2593, 33 L. Ed. 2d 484.

y satisfied that the terms of probation had been lated and, impliedly, that the beneficial purposes probation were no longer being served, then the er must stand. *United States* v. *Carrion*, supra; ted States v. *D'Amato*, 429 F.2d 1284, 1286 (3d .); *United States* v. *Nagelberg*, 413 F.2d 708, 710 Cir.), cert. denied, 396 U.S. 1010, 90 S. Ct. 569, L. Ed. 2d 502; *United States* v. *Markovich*, 348 d 238, 241 (2d Cir.); *State* v. *Spicer*, 3 Ore. App. 471 P.2d 865; *Tillinghast* v. *Howard*, 108 R.I. , 501, 287 A.2d 749. Here the defendant, afforded earing and represented by counsel, admitted having been convicted of a felony and the admitted evidence showed that the underlying act was committed by the defendant while on probation. The l court acted well within its discretion in revoking probation.

The state has suggested that an order revoking bation is not a final judgment for the purposes appeal and notes a decision of the Appellate Division of the Circuit Court which held, in the circumnces of that case, that the order was not appealble. See *State* v. *Saavedra*, 5 Conn. Cir. Ct. 367, , 253 A.2d 677. "In a criminal case the imposition sentence is the judgment of the court." *State* v. *ore*, 158 Conn. 461, 463, 262 A.2d 166; *State* v. *ith*, 149 Conn. 487, 489, 181 A.2d 446. In the rs when probation was considered as purely a tter of grace, its revocation logically was considered to be a matter almost entirely within the distion of the court. A defendant could appeal only m the original sentence; the revocation of proban, if it was to be attacked at all, could be attacked y by habeas corpus proceedings. See, e.g., *Belden Hugo*, 88 Conn. 500, 91 A. 369.

Under our present day procedure, a revocation probation and an order for execution of sentence y be ordered only after a full hearing at which defendant is afforded his rights to counsel, to ss-examine witnesses and to present evidence his own behalf. General Statutes § 53a-32; see *mpa* v. *Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 Ed. 2d 336. The inquiry preceding a revocation probation concerns matters totally independent the original conviction, the decision of the court rks the final disposition of a judicial proceeding thorized by statute and it is, in effect, a final dification of the sentence which is the judgment the court in the proceedings against the defend- . We conclude that the order revoking probation d implementing the sentence of confinement with consequent deprivation of the defendant's liberty ets the test of a final judgment as prescribed in 52-263 of the General Statutes. "A final judgment the adjudication which finally disposes of the case before the court." *State* v. *Moore*, supra; and, as this court stated in *Howarth* v. *Northcott*, 152 Conn. 460, 462, 208 A.2d 540: "The test of a final judgment lies, not in the nature of the ruling, but in its effect in concluding the rights of the party appealing; if his rights are concluded so that further proceedings after the ruling cannot affect them, there is a final judgment."

There is no error.

In this opinion the other judges concurred.

SUPREME COURT

May Term, 1973

CYNTHIA B. CLEVELAND *v.* JOHN L. CLEVELAND, JR.

Appeal by the plaintiff from the modification of a judgment by the Superior Court in Fairfield County, *Mulvey, J.*, following a remand of the case on a previous appeal. *No error.*

Ralph P. Dupont, with whom, on the brief, was *Antoinette L. Dupont*, for the appellant (plaintiff).

Frederick L. Comley, with whom, on the brief, was *Robert J. Cooney*, for the appellee (defendant).

BOGDANSKI, J. The plaintiff has taken this appeal from the action of the Superior Court in deleting an educational expense provision from a divorce decree dated December 12, 1967, and substituting therefor a new order of support. The deleted provision had required the defendant "to pay the expense of board, room and tuition of each such child in boarding school or college, provided that he is consulted with and approves those educational institutions before matriculation." The new order of support directed the defendant to pay the plaintiff $1500 per year for each child and all medical and dental bills exceeding $100 for any one accident or illness for each child.

The plaintiff directs several assignments of error at the court's finding. She contends that the court failed to add twenty-four paragraphs to the finding which, she claims, were either admitted or undisputed. No additions to the finding are warranted, however, because some of the proposed additions are merely detailed restatements of facts already in the finding and the rest either are immaterial or are not undisputed. *Malarney* v. *Peterson*, 159 Conn. 342, 344, 269 A.2d 274; *Brauer* v. *Freccia*, 159 Conn. 289, 290, 268 A.2d 645; *Bent* v. *Torell*, 139 Conn.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PETITION FOR A WRIT OF HABEAS CORPUS
(By a person in State custody)

Full name of Petitioner
JASPER ROBERSON

vs

STATE of CONNECTICUT
Name of Respondent

Civil No. _____
To be supplied by Clerk

1. Place of detention. CONN. CORR. INST., Somers, Conn.

2. Name and location of the court which imposed sentence. New Haven Superior Court in and for the County of New Haven, Conn.

3. Case number or numbers in court where sentenced. 16039, 16787.

4. The offense or offenses for which sentence was imposed. Violation of probation, robbery with violence (two (2) counts).

5. Date and terms of sentence or sentences. Oct. 8, 1971--(2-5) years, July 9, 1971--(2-4) years, Oct. 8, 1971--(4-3) years in prison.

6. Was a finding of guilty made: (Check one)
   (a) After a plea of guilty?
   (b) After a plea of nolo contendere?
   (c) After a trial by a judge?
   (d) After a trial by a judge and jury?

7. Did you appeal from the judgment of conviction or sentence imposed? If you answered yes, then:

   (a) To what court or courts did you appeal? State Supreme Court.

   (b) State the decision or decisions of the court or courts to which you appealed. Denied error in the violation of probation appeal, other two still pending.

   (c) If you know, give the date of each decision and a copy or citation of each. Violation of probation--April 3, 1973, see: Conn. Law Journal, June 19, 1973, Vol. XXXIV No. 51.

8. If you did not appeal from your conviction and sentence or sentences why did you not do so?

unlawfully in custedy. Be sure and give all facts which support your reasons. Denial of Appellate review due to the lack of diligence on the part of the state, [illegible] v. STATE of FLORIDA, 388 F.2d 424 (1968) and cases therein. Revocation of probation for conviction which was on appeal, [illegible] v STATE, S.W. 2d 40 (Tex. Crim. App. 1960), JACKSON v. STATE, 473 S.W.2d 40 (Tex. Crim. App. 1971).

10. Before filing this petition have you filed in any State or Federal court any petition for a writ of habeas corpus or for any other relief? Yes.

(a) If you have, name the court or courts and the results of your filing those petitions or motions. United District Court for the District of Connecticut. No reply. Issue was revocation of probation for offense under appeal.

(b) On what ground or grounds did you seek relief in those petitions or motions? That probation was revoked because Petitioner was convicted of crimes which he has appealed.

(c) If the ground or grounds in those motions or petitions did not include the grounds you set forth in this petition, why did you not set forth these grounds? Petitioner had not known that his rights were being violated at that time. Also there was the possibility that Petitioner could get that ruling overturned and make parole.

11. Were you represented by an attorney or attorneys at any time during the course of the proceedings against you? Yes.

(a) Name and give the address of such attorney or attorneys, if any, and state at what stage of the proceedings he or they represented you.
John R. Williams
265 Church St.
New Haven, Conn.

12. Have you read the instructions furnished with this petition and checked all of the answers and statements made in this petition? Yes.

Jasper Roberson
Signature of Petitioner

State of Connecticut)
County of Tolland) ss

Jasper Roberson, being first duly sworn, states that he
Name of Petitioner
has signed the foregoing petition and that the information therein is true and correct to the best of his knowledge and belief.

Jasper Roberson
Signature of Petitioner

Subscribed and sworn to before me this 5th day of Sept 1973

amination to test the trustworthiness of the ness' testimony. 3 Wigmore, Evidence (Chadarn Rev. 1970) § 762.

No logical reason exists for restricting the oppot's right to examine the writing because the ness consulted it before he took the stand. [T]hough there is no objection to a memory being as stimulated, yet the risk of imposition and the ed of safeguard is just as great. It is simple and sible enough for the court to require that the per be sent for and exhibited before the end of trial." 3 Wigmore, op. cit., p. 140. "[T]he public erest in the full disclosure of the source of a ness's testimony seems a weightier considera-n" than discouraging "prying into the opponent's

CONNECTICUT SAVINGS AND LOAN ASSOCIATION *v.* WILBERT MITCHELL ET AL.

The plaintiff's motion to dismiss the appeal from Superior Court in Hartford County is denied.

Jeffrey M. Miner, for the appellee (plaintiff).

Mary V. McCarthy, for the appellants (defends).

Argued January 2—decided January 2, 1974

CHARLES H. MILLER *v.* HABIB FARRAH ET AL.

The plaintiff's motion to dismiss the appeal of the endants Drexel, Kidder and Peabody, Inc., and nsworth Associates, Ltd., Inc., from the Court Common Pleas in Middlesex County is granted.

David E. Kamins, for the appellee (plaintiff).

No appearance for the appellants (defendants).

Argued January 2—decided January 2, 1974

SIDNEY ROSENBLUM, TRUSTEE *v.* WILLIAM A. BECKERMAN ET AL.

It appearing that the parties in the above-entitled case have failed to prosecute their appeals from the Superior Court in Hartford County, it is, under Practice Book § 696, ordered by the Supreme Court, suo motu, that the case be and hereby is dismissed.

Robert L. Coates, for the appellees-appellants (defendants).

No appearance for the appellant-appellee (plaintiff).

Argued January 2—decided January 2, 1974

STATE OF CONNECTICUT *v.* JASPER ROBERSON

The defendant's motion in the appeal from the Superior Court in New Haven County (1) that this court set aside the judgment of the trial court on the first count of the information is granted unless the state files its counterfinding on or before January 22, 1974, and (2) that this court set aside the judgment on the second count of the information is denied.

John R. Williams, special public defender, for the appellant (defendant).

Jerrold H. Barnett, assistant state's attorney, for the appellee (state).

Argued January 2—decided January 2, 1974

RORABACK, WILLIAMS & AVERY
ATTORNEYS AT LAW
265 CHURCH STREET
NEW HAVEN, CONNECTICUT 06510
TELEPHONE (203) 562-9931

CATHERINE G. RORABACK
JOHN R. WILLIAMS
MICHAEL AVERY

February 26, 1974

Ms. Erika Holzer
Attorney at Law
25 Sutton Place South
New York, New York 10022

RE: JASPER ROBERSON

Dear Ms. Holzer:

Enclosed is relevant material from my file regarding the captioned matter.

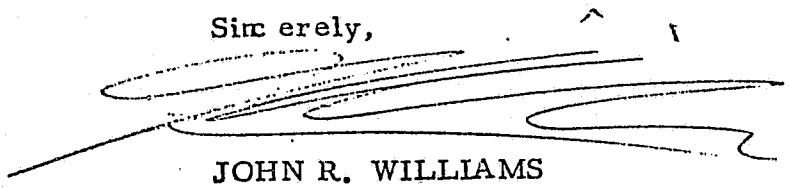
As you can see, following Judge Clarie's decision, motions to set aside were filed with the Connecticut Supreme Court. As predicted, one was denied and the other was granted with a stay more than long enough to permit the State to file its counter-finding in that case. Why, you may ask, was one motion granted and the other denied on identical facts in the same case? The reason is that, on oral argument, the State represented that one counter-finding was being typed but the other had not yet been started. Thus, as to the first, the Court could appear to be kind without, etc.....

The only other point I would note is that, despite the insistence of the State and the various courts that Mr. Roberson had admitted being in violation of probation, the record and the facts are directly contrary. He admitted that he had been placed on probation as alleged and that he had thereafter been arrested as alleged. This has since been construed as an admission that he was guilty of the offenses for which arrested -- a ridiculous proposition considering he was then commencing an appeal from his conviction thereon.

The two appeals remain pending. In that where the counter-finding was filed, the Court has not yet filed a Finding. In the other, no counter-finding has been filed. The sentences, of course, have been served. This case is one of many which are coming to the attention of the federal district court here and -- one has some reason to hope -- will soon prompt a federally-ordered reform of Connecticut's archaic appellate procedures.

Mr. Roberson is a good man. I'm glad you're working on this appeal, wish you luck, and hope you will keep me advised of developments.

Sincerely,



JOHN R. WILLIAMS

A-45

RORABACK, WILLIAMS & AVERY
ATTORNEYS AT LAW
265 CHURCH STREET
NEW HAVEN, CONNECTICUT 06510
TELEPHONE (203) 562-9931

CATHERINE G. RORABACK
JOHN R. WILLIAMS
MICHAEL AVERY

March 5, 1974

Prof. Henry Mark Holzer
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201

RE: JASPER ROBERSON

Dear Mr. Holzer:

Enclosed is a copy of the Court's Finding in Mr. Roberson's probation violation matter, as well as my only copy of the transcript of that proceeding. The Record -- which includes the Finding -- is an extra copy you may keep. I would appreciate receiving back the transcript, however.

The chronology of these cases is as follows:

January, 1970 — Two separate and unrelated incidents of robbery with violence. Mr. Roberson arrested and held in lieu of bond.

During the ensuing 1-1/2 years, Mr. Roberson was represented in succession by three attorneys other than myself. One was with New Haven Legal Assistance Association. One was the Superior Court Public Defender. The third was a Special Public Defender -- a private attorney appointed by a Superior Court Judge. During this period, Mr. Roberson filed at least one petition for writ of habeas corpus, pro se, in the state court and lost same.

Early in 1971, while I was with New Haven Legal Assistance, I took over Mr. Roberson's cases at his request. Several motions involving evidentiary hearings, etc., were promptly filed and heard during the spring of 1971. Among these was a challenge to the jury array which consumed several days of testimony. His first trial was held before Judge Parskey in June of 1971.

June 30, 1971	Found guilty of simple robbery, a lesser included offense.
July 9, 1971	Sentenced to 2-4 years for robbery.
Aug. 6, 1971	By this time I was in private practice. I was appointed special public defender for the limited purpose of handling the appeal from the June trial. Transcript ordered.
September, 1971	Trial before Judge Levine on the other robbery with violence case. I handled this on a pro bono basis.
October 1, 1971	Found guilty of robbery with violence.
October 8, 1971	Sentenced to 4-8 years for robbery with violence. Probation revoked.
November 17, 1971	I was appointed special public defender to handle the second appeal. Transcript ordered.
December, 1972	Court reporter provided me with transcripts of both trials, all pre-trial motions, and the hearing on the challenge to the array. Approximately 2,000 pages.
~~August xx 1973~~ June 19, 1973	Supreme Court affirms revocation of probation.
August, 1973	Draft Findings and Special Draft Findings filed regarding both trials.
Nov. 9, 1973	Judge Clarie dismisses petition for habeas on ground of failure to exhaust State remedies.
Nov. 27, 1973	Motion to Set Aside Judgment filed in Supreme Court pursuant to Section 696 of Conn. Practice Book.
January 2, 1974	Motion to Set Aside argued. Supreme Court denies it as to the trial before Judge Levine; as to the trial before Judge Parskey, Supreme Court grants it unless State files Counterfinding on or before January 22.

January 14, 1974 State files Counterfinding re trial before Judge Parskey.

March 5, 1974 Judge Parskey files Finding.

That brings the matter up to date. If I've omitted anything you need, please advise.

The next step regarding the Parskey case is for the defense to file an assignment of errors within ten days. Then the Record is printed. A process that may take two or three months. Then briefs are printed. This appeal is unlikely to be heard before late 1974 or early 1975.

Meanwhile, the Levine appeal languishes awaiting action by the State's Attorney's office on the counter-finding.

Sincerely,

JOHN R. WILLIAMS

cc: Jasper Roberson

On this day I caused a copy of this Brief and Appendix to be mailed, first class, to Jerrold H. Barnett, Esq., Assistant State's Attorney, State of Connecticut, at 121 Elm Street, New Haven, Connecticut.

Henry Mark Holzer
March 20, 1974